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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 83

RICHARD McALLISTER, PETITIONER,

v.

MAGNOLIA PETROLEUM COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF THE
STATE OF TEXAS, FIFTH SUPREME JUDICIAL DISTRICT

Petition for Certiorari

Filed December 21, 1956

Certiorari Granted February 25, 1957

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

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RICHARD McALLISTER, PETITIONER,

vs.

MAGNOLIA PETROLEUM COMPANY

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STATE OF TEXAS, FIFTH SUPREME JUDICIAL DISTRICT

INDEX

Original Print

Record from the District Court of Dallas County, Texas,
134th Judicial District

Caption (omitted in printing)	A
File endorsement only appearing on plaintiff's original petition showing date of filing of original action in Harris County, Texas, as August 27, 1953	B
Defendant's third amended original answer	F 1
Plaintiff's first amended original petition	K 5
Statement of facts (Excerpts from)	1 10
Appearances	1 10
Deposition of Captain Ferdinand Dressel read	4 10
Testimony of Richard Andrew McAllister—direct	22 20
Offers in evidence	27 23
Testimony of Richard Andrew McAllister—direct	29 24
Offer in evidence	65 43
Testimony of Richard Andrew McAllister—direct	66 43
—cross	81 52
Testimony of Richard Andrew McAllister—(recalled) cross	237 65
Offers in evidence	285 89

	Original	Print
Testimony of Richard Andrew McAllister—cross	286	90
—redirect	329	112
—recross	341	118
E. H. Young—direct	368	131
Offer in evidence	381	138
Testimony of E. H. Young—direct	381	138
—cross	388	142
—redirect	423	159
—recross	426	161
—redirect	427	162
Plaintiff's Exhibit No. 35 (Excerpts)	428	162
Defendant's Exhibit No. 7 (Excerpts)	430	164
Stipulation (regarding life expectancy of plaintiff and value of dollar)	432	164
Plaintiff rested	432	164
Testimony of Frank Riess—direct	433	165
Offers in evidence	439	168
Testimony of Frank Riess—direct	440	168
—cross	479	189
—redirect	507	204
Offer in evidence	510	206
Testimony of Frank Riess—recross	513	208
J. V. Gibson—direct	514	208
—cross	523	213
—redirect	526	214
—recross	526	214
Testimony of Cecil M. Rhodes—direct	528	214
Offer in evidence	542	222
Testimony of Cecil M. Rhodes—direct	542	222
Offer in evidence	573	238
Testimony of Cecil M. Rhodes—direct	573	238
—cross	576	239
—redirect	602	253
—recross	609	257
Ferdinand B. Dressel—direct	612	258
—cross	620	263
—redirect	631	268
John Pullin—direct	634	269
—cross	655	280
—redirect	670	288
—recross	674	290
George Rosson—direct	677	291
George Rosson (recalled)—direct	767	301
—cross	772	304
Raymond L. Vandever—direct	788	312
—cross	808	322
—redirect	811	324
—recross	814	326
Testimony of Raymond L. Vandever—redirect	815	326
—recross	817	327
Harry A. Barkley—direct	818	327
Motion to strike the evidence and denial thereof	823	330
Testimony of Harry A. Barkley—cross	823	330
Offers in evidence	825	331
Defendant rests	825	332

	Original	Print
Testimony of Mrs. Richard A. McAllister—direct	842	332
Richard A. McAllister (recalled)—redirect	845	334
—cross	848	335
—redirect	850	336
—recross	852	337
B. V. Ashton—direct	854	338
Defendant's bill of exception	858	340
Testimony of George Rosson (recalled)	858	340
Offers in evidence	865	344
Reporter's and counsels' certificates (omitted in printing)	867	344
Judge's approval to statement of facts	867	345
Defendant's exhibits:		
No. 1—Page from Log of the J. C. Stephens including the period of October 18, 19, 20, 1950	869	345
No. 3—Page from catalog of Heintz Mfg. Co. showing pictures of Treads and measurements	871	348
Defendant's exhibits:		
No. 4—Weekly report of Magnolia Petroleum Company vessel (J. C. Stephens) for week ending October 24, 1950	872	349
No. 22—Page from Log of the J. C. Stephens including the period of October 21, 22, 23 and 24, 1950	873	351
No. 30—Diagram showing experimental setup used in determining the coefficient of friction between shoes and steps	874	353
No. 32—Caption only of deposition of Burke V. Ashton, etc.	875	355
Plaintiff's trial amendment	876	355
Charge and verdict	878	357
Plaintiff's requested instruction No. 1	893	368
Plaintiff's special issue	894	369
Plaintiff's requested issue	895	369
Plaintiff's objections and exceptions to the court's charge	896	370
Stipulation re single question sent out by jury	910	381
Judgment	911	381
Clerk's certificate (omitted in printing)	928	395
Plaintiff's motion for new trial	929	395
Affidavit of Leslie J. Bird	942	406
Affidavit of E. S. Huber	945	408
Affidavit of J. A. Foster	947	410
Affidavit of J. B. Flatt	949	412
Affidavit of Duard Terry	952	414
Affidavit of James H. Brown	954	416
Order overruling plaintiff's and defendant's motions for new trial and notice of appeal	958	418
Appeal bond (omitted in printing)	958a	419
Clerk's certificate (omitted in printing)	959	419
Proceedings in the Court of Civil Appeals for the Fifth Supreme Judicial District at Dallas, Texas	960	419
Stipulation regarding the question sent out by the jury for instructions, etc.	960	419
Opinion, Dixon, Ch. J.	962	421

Index Continued

	Original Print
Judgment	970 427
Appellant's motion for rehearing	971 428
Order overruling motion for rehearing	981 436
Opinion on rehearing, Dixon, Ch. J.	982 436
Proceedings in the Supreme Court of Texas	983 437
Petitioner's application for writ of error—see separate index ..	984 438
Reply to application for writ of error—see separate index ...	1042 482
Order refusing application for writ of error	1055 490
Order overruling motion for rehearing	1056 490
Order granting motion for leave to proceed in forma pauperis and petition for writ of certiorari	1057 491

E ENDORSEMENT ON INSTRUMENT: No. 90186-A, Richard McAllister vs. Magnolia Petroleum Company, Plaintiff's Original Petition, Filed April 30, 1954, BILL SHAW, District Clerk, Dallas County, Texas, /s/ Buford Deputy.

Filed August 27, 1953, J. W. Mills, District Clerk, Harris County, Texas, By /s/ A. M. Richards, Deputy.

F IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS, 134TH JUDICIAL DISTRICT.

[Title omitted]

Defendant's Third Amended Original Answer—Filed January 27, 1955

To the Honorable Judge of Said Court:

Now comes defendant, Magnolia Petroleum Company, in the above entitled and numbered cause, and in answer to plaintiff's original petition would show the court:

1.

Defendant denies each and every allegation contained in said original petition and demands strict proof thereof, and of this it puts itself upon the country.

2.

Defendant specially denies the allegations of plaintiff's original petition contained in Paragraph III thereof, that the M/V J. C. STEPHENS and its portholes were unseaworthy or not water-tight, or that the steps leading from the crew's lounge to the galley were covered with sea water, oil, grease, and other slippery substance, but would affirmatively show that, on the contrary, the M/V J. C. STEPHENS was a staunch and seaworthy vessel in every respect on the 19th day of October, 1950, was practically new and in new condition, designed and outfitted for the uses for which it was intended and utilized, manned by an adequate experienced crew with all of the safety appliances and devices available at the time of its construction.

Defendant, denying that plaintiff fell as alleged, would show that the steps leading from the lounge to the crew's gallery are so constructed that there is a metal hand rail on the port side of the vessel alongside the steps, so placed and designed to be used by any person going up or down the steps, and that, in addition thereto, there is located another hand rail commonly called a grab iron which is affixed in a horizontal position and attached to the overhead in the galley, so designed and located as to be used by a person coming down the steps, and when so used will prevent a person from falling from said steps. That at the time the alleged fall occurred the steps in question were virtually new, having been original equipment in the vessel, which was itself built and placed in service less than a year before the alleged accident occurred; that such steps were of aluminum construction with alternative strips of abrasive forming the tread, so designed and installed as to minimize slipping by one using the steps. Defendant would show that plaintiff's fall, if any he sustained, was not caused or contributed to be caused by the unseaworthiness of the vessel, or by any act of negligence on the part of the defendant or its employees, but that the fall, if it occurred, was solely caused or was contributed to be caused by the conduct of the plaintiff in the following particulars, to-wit:

- (a) Plaintiff attempted to descend the ladder without facing the steps thereof.
- (b) Plaintiff attempted to descend the ladder without using or without properly using the hand rail and grab iron provided for that purpose.
- (c) Plaintiff knew or should have known of the presence of sea water, if any was present, which this defendant denies, upon the steps of the ladder, and failed to correct such condition by swabbing or mopping the same from the steps or having the same done before descending the ladder.

That each of these acts by plaintiff either separately or jointly constituted a failure to use due care for his own safety, which resulted in the injury complained of and either was the sole cause of the accident or was such contributory negligence as proximately caused the

injury and should be considered in mitigation of plaintiff's damage, if any.

4.

Defendant, denying that plaintiff fell as alleged, would show the court that immediately before plaintiff attempted to go down the steps from which he alleges that he fell he had been upon a weather deck of the boat aiding in the handling; that such weather deck was exposed to the rain and the sea and that while upon such weather deck the plaintiff had gotten the soles of his shoes wet with water and that this condition was the sole proximate cause of the fall, or, in the alternative, made the fall, if any, the result of an unavoidable accident, or, in the alternative, plaintiff's attempted descent with his shoes slippery and wet was such an act of negligence which proximately caused or contributed to the fall, if any, and should be taken into account in mitigation of any damage suffered by the plaintiff.

5.

Pleading alternatively, defendant would further show the court that the fall, if any sustained by the defendant, was the result of the heavy seas and weather and without negligence of either plaintiff or defendant, and was thus an unavoidable accident.

6.

Pleading alternatively, defendant would further show that the fall, if any sustained by defendant, was solely the result of an act of God, and the heavy weather and seas and wind accompanying the tropical storm was the sole cause of the plaintiff's fall and injuries, if any.

7.

Pleading further, this defendant would show that I the plaintiff's cause of action for maintenance should not now be permitted because of the long lapse of time and delay which plaintiff has occasioned by failure to previously assert a claim therefor from and after October 19, 1950 to August 27, 1953, and that the same is barred by laches, and of this it prays judgment of the court.

8.

Pleading further, defendant would show that plaintiff's cause of action for personal injuries suffered, if any, and based upon the alleged unseaworthiness of the vessel is barred by the two year statute of limitation, Article 5526, Revised Civil Statutes of Texas: Wherefore, defendant prays that plaintiff take nothing by reason thereof and that defendant have judgment for its costs.

9.

Pleading further, defendant would show that plaintiff's cause of action for personal injuries suffered, if any, which is based upon that certain Act of Congress on March 5, 1915, C. 153, Sec. 20, 38 Statutes 1175, amended June 5, 1920, C. 250, Sec. 33, 41 Statutes 1007, being also known as the Jones Act, Sec. 688, Title 46 of the United States Code Annotated, was not brought within the period prescribed in such Act. Wherefore, defendant prays judgment that plaintiff take nothing against it, and that it have judgment for its costs.

WHEREFORE, premises considered, defendant prays that upon a final hearing hereof it have judgment that the plaintiff take nothing against it, and that it be discharged with its costs.

EARL A. BROWN

CHAS. B. WALLACE

/s/ Frank C. Bolton, Jr.

FRANK C. BOLTON, JR.

P. O. Box 900

Dallas, Texas

Attorneys for Defendant,

Magnolia Petroleum Company

[File endorsement omitted]

K IN THE DISTRICT COURT OF DALLAS
COUNTY, TEXAS, 134TH JUDICIAL DIS-
TRICT

[Title omitted].

**Plaintiff's First Amended Original Petition—Filed February 28,
1955.**

To THE JUDGE OF SAID COURT:

Now COMES RICHARD McALLISTER, hereinafter styled plaintiff, complaining of MAGNOLIA PETROLEUM COMPANY, hereinafter designated as defendant, with leave of Court had and obtained files this his First Amended Original Petition, and for cause of action would respectfully show your Honorable Court as follows:

I.

That plaintiff is a resident citizen of Houston, Harris County, Texas; that the defendant is a corporation duly organized under and by virtue of law upon whom service has already been had.

II.

Plaintiff would show that on or about the 2nd day of February, 1949, he was employed by the defendant herein as an engineer aboard its seagoing vessels, including the M/V J. C. STEPHENS, at wages of approximately Four Hundred Five Dollars (\$405.00) per month, plus room and board and on other terms and conditions, all of which will be shown during the trial of this cause.

III.

Plaintiff would show that on or about the 19th day of October, 1950, while employed as an engineer aboard the M/V J. C. STEPHENS owned and operated by the defendant herein, and while in the discharge of his regular duties as an engineer on said vessel, and while walking down the stairs leading to the galley, he slipped and fell

L to the deck below injuring his back and other parts of his body, as hereinafter more fully shown. That said fall proximately causing plaintiff's injuries was caused by the negligence of the defendant and/or the unseaworthiness of the vessel J. C. STEPHENS, as hereinafter shown.

IV.

Plaintiff alleges that his said injuries and the complications resulting therefrom, as aforesaid, were proximately caused and contributed to be caused by the negligence of the defendant; its master, officers, agents and employees in the following particulars, among others, to-wit:

- 1) In negligently failing to have and keep the portholes over and near the stairs leading to and from the galley of the J. C. STEPHENS watertight;
- 2) In negligently failing to keep the portholes, gaskets and attachments in proper working condition so that water may not leak through them;
- 3) In negligently failing to keep the portholes, gaskets and attachments in proper repair so that water may not leak through them;
- 4) In permitting the condition of leaking portholes over and near the stairs leading to and from said galley to exist thus creating a danger to all of those using said stairs;
- 5) In negligently permitting the portholes over and near the stairs leading to and from the galley of the J. C. STEPHENS in a condition that water would leak through them;
- 6) In negligently having oil, grease, or other slippery substance on the stairs leading to and from the galley of the J. C. STEPHENS;
- 7) In negligently failing to remove said oil, grease, or other slippery substance from said stairs;
- M 8) In negligently having the deck above the galley in a condition so that the water and/or water and oil would leak through such deck and on to the stairs leading to and from the galley of the J. C. STEPHENS;
- 9) In negligently failing to keep the deck above the galley watertight;
- 10) In negligently permitting a condition to exist where water and oil mixed and accumulated on the stairs leading to and from the galley of the J. C. STEPHENS.

And plaintiff states that each and all of the foregoing conditions, facts and circumstances were well known to the defendant, its master, and Chief Mate, agents, servants and employees, or in the exercise of ordinary care, the same should have been known to them, and that each and all of the aforementioned facts, conditions, circumstances, and acts of omission as well as commission, constituted negligence on the part of said defendant, its agents, servants, employees and Master, and the failure to use ordinary care, and each and all, taken singly and in conjunction with each other, proximately caused and contributed to cause plaintiffs injuries and resulting complications, disabilities and damages of which he herein complains.

V.

Plaintiff further alleges that as a concurrent cause of the injuries sustained by him was the unseaworthiness of the said J. C. STEPHENS, proximately causing his injuries in that the portholes on said vessel were unseaworthy, i.e., they were not watertight; that by reason of such unseaworthy portholes whenever said vessel would encounter seas which would strike at or near the area where the portholes are located, or by reason of sea spray at sea, N water would come through said leaking or otherwise unseaworthy portholes causing said water to fall or accumulate and/or remain on said stairs leading to and from the galley which either by itself, or in connection with other slippery substance that may have accumulated on said stairs caused plaintiff's injuries, as hereinabove alleged.

Plaintiff would further show that said vessel was unseaworthy in that the deck above said galley was not watertight so that any water that would accumulate on the deck or be on the deck, instead of draining through scuppers or remaining on said deck, would come through said ceiling into the galley and on to the stairs leading to and from said galley. That the portholes were leaking and unseaworthy and the gaskets were improperly placed so that sea water would leak through, causing said stairs to be wet and slippery, that singly and together with the oil and grease on said steps caused a serious and dangerous condition to exist to those working in that area and particularly to plaintiff herein.

VI.

Plaintiff would further show that, as hereinabove alleged, when he was attempting to walk down the stairs leading to the galley he stepped on one of the steps forming said stairs, and as he did so, he slipped and fell down the ladder and onto the deck below seriously injuring plaintiff's back, left shoulder and legs; that the tendons, ligaments, bloodvessels, bones, cartilages in between his vertebrae have been seriously bruised, ruptured and torn apart; that the pain in his back radiates to the right buttock and to the posterolateral aspect of the thigh and leg down to his ankle; that his condition has become progressively worse

so that now he can not stand for any lenght of time without great pain, particularly in his right leg; that he has difficulty bending over or straightening up; further by reason of the injury to his back he suffers from protruded intervertebral disc, or discs; that his entire nervous system has been effected thereby, and plaintiff is unable to sleep at night and has become highly nervous. Plaintiff knows no trade or profession whereby he may earn a living save as a seaman and work involving hard manual labor; and that as a result of said injuries and the complications therefrom plaintiff has been unable to continue in such employment; that his ability to work and earn money has been seriously diminished and impaired. Plaintiff has been unable to work from the day he left defendant's employ to the time of the filing of this amended petition, and, therefore, has suffered loss of wages from said date to the date of trial and will suffer loss of wages and ability to work and earn money in the future, so that his earning capacity has been seriously diminished and impaired. Plaintiff has suffered, suffers and will continue to suffer for a long time in the future physical pain and mental anguish; that he will have to undergo a serious and painful operation on his spine, all of which will be accompanied with severe and agonizing pain and leave permanent and lasting disabilities. That he is unable now and has been unable to obtain medical care and attention from the United States Public Health Service facilities, and, therefore, he has spent reasonable and necessary moneys for doctors bills, back braces and back supports, and will have to spend moneys for operations, hospitals

and nurses expenses in the future, which together with the loss of wages to the date of trial, his lost or diminished capacity to earn money in the future has caused plaintiff to suffer serious damages; that from the date of this trial plaintiff has a life expectancy of thirty-six (36) years, thirty (30) of which at least would have been fruitful years, as a result of which plaintiff has been damaged in the sum of One Hundred Twenty-five Thousand Dollars (\$125,000.00), consisting of wages to the date of trial, loss of earning capacity in the future, and past, present and future necessary and reasonable medical expenses for doctors, hospitals, nurses, appliances, and medicines.

VII.

That while plaintiff was so employed by the defendant as a member of the crew of the J. C. STEPHENS, and while in the performance of his duties and in the regular scope of his employment, he suffered serious and disabling injuries, as a result of which he has been and still is disabled from performing his duties as a seaman and by reason thereof he is entitled to maintenance under the law; as well as by contract, from the date of his injuries until his condition will become static, exclusive of any days he may have been confined in a United States Marine Hospital, at the rate of Eight Dollars (\$8.00) per day, or the contractual rate then applicable for maintenance; without prejudice to his right to claim maintenance in the future and beyond the date the Court or jury may determine at the trial of this cause, if the facts show that he is entitled to such maintenance.

VIII.

Plaintiff has elected to bring and maintain his suit as an action for damages at law with the right of trial by jury in compliance with and under the provisions of that certain Act of Congress on March 5, 1915, C. 153, Sec. 20, 38 Statute 1175, amended June 5, 1920, C. 250, Sec. 33, 41 Statute 1007, being also known as the Jones Act, Sec. 688, Title 46 of the United States Code Annotated.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that citation issue and be served upon the said defendant, Q Magnolia Petroleum Company, in form and manner

required by law, requiring the defendant to appear and answer herein, and that upon final hearing hereof plaintiff have judgment against said defendant in the sum of One Hundred Twenty-five Thousand Dollars (\$125,000.00), plus such maintenance as plaintiff may show himself entitled to receive, without prejudice to his right to future maintenance, together with interest thereon from the date of said injury, all costs of court, and all such other and further relief to which he may be entitled in the premises.

MANDELL & WRIGHT,
By /s/ ARTHUR J. MANDELL
Attorneys for Plaintiff.

(File endorsement omitted)

IN THE DISTRICT COURT OF DALLAS
COUNTY, TEXAS, 134TH JUDICIAL DISTRICT

No. 90186-G

RICHARD McALLISTER

vs.

MAGNOLIA PETROLEUM COMPANY

Statement of Facts

APPEARANCES:

WRIGHT & MANDELL, By MR. A. J. MANDELL, for Plaintiff
MR. FRANK C. BOLTON and MR. J. E. EARNEST, for Defendant

BE IT REMEMBERED that upon a trial of the above entitled and numbered cause in the 134th District Court on the 7th day of March, 1955, before Hon. Charles E. Long, Judge of said court, and a Jury the following proceedings were had:

Mr. Mandell: We offer the Deposition of Captain Ferdinand B. Dressel as follows:

(Reading from beginning of deposition through to bottom of Page 104, as follows:)

FERDINAND B. DRESSEL was called as a witness by the plaintiff, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Mandell:

Q. Mr. Dressel, where do you live, please, sir? A. I live in Morgan City.

Q. What is the address? A. 1123 Fourth Street.

Q. Who are you employed by? A. Magnolia Petroleum Company.

Q. How long have you been employed by them? A. Going on seven years.

Q. In what capacity have you been employed by them? A. Well, I have been employed as a mate, but now I am alternate captain.

Q. On what? A. On the Motor Vessel, J. C. Stephens.

Q. In 1950, in what capacity were you employed by the Magnolia Petroleum Company? A. I was employed in 1948 as a mate.

Q. What about 1950? A. Well, 1950 I was alternate Captain.

Q. Alternate Captain? In such capacity as alternate Captain, did you serve on the J. C. Stephens? A. I am sorry, sir. I didn't get it.

Q. Did you serve in the capacity of Captain on the J. C. Stephens? A. That is right, yes.

Q. Now, the J. C. Stephens is a seagoing vessel? It goes out in the Gulf of Mexico and back? A. That is right.

Q. And how many does it have in the crew? A. Three.

Q. And who are they? Who are these three? A. Well, you mean at that time?

Q. Yes. I don't mean the names. I mean the capacities. You have a Captain? A. Got a captain; an engineer and a seaman.

Q. Now, who has charge of the navigation of the boat? A. I have.

Q. The Captain? A. Yes, sir.

Q. Who has charge of cleaning and keeping the galley and the passengers' lounge clean? A. The deckhand, sir.

Q. Who has charge of the engine room? A. The engineer.

Q. Who has charge of keeping the engines clean? A. The engineer.

Q. What does that boat do? What is its function? A. Well, it transports personnel from the Gulf to town.

Q. Whose personnel? A. Magnolia Petroleum Company.

Q. In other words, it is used to transfer Magnolia Petroleum Company employees from a rig some place into wherever you carry them? Is that correct? A. That is correct, yes, sir.

Q. Now, do you remember having an employee by the name of Mr. McAllister, this gentleman sitting at my right here? A. Yes, sir.

Q. In what capacity was he employed on the Stephens? A. As engineer.

Q. When he worked as an engineer, he was also an employee of the Magnolia Petroleum Company, was he not? A. Yes, sir, he was.

Q. And the J. C. Stephens is a boat owned and operated by the Magnolia Petroleum Company? A. That is right.

Q. Now, as an engineer, did McAllister have the duty to keep and maintain the engines and see that the boat ran properly from an engineer's standpoint? A. That is right, sir.

Q. Now, do you remember having any port holes that were leaking on the J. C. Stephens? A. Port holes, sir?

Q. Yes, sir. A. No. We didn't have any port hole leaking, sir.

Q. Didn't have any water coming through the port holes? A. We had water coming in through the lights on the side, regarded as windows.

Q. Well, when I use the term "port hole" I mean actually a port hole on the side of the ship, in the skin of the ship. A. Well, I misunderstood you because we don't have any port hole on the side. We only have two port holes on the front and we have windows all about the boat.

Q. You don't have any port holes on the side of the ship? A. No, sir.

Q. On the side of the Stephens? A. No, sir.

Q. No windows at all? A. There are windows above the deck, yes, sir. They are in the house.

8 Mr. Bolton: He is calling "windows" what you are calling "port holes". That is where your trouble is.

Mr. Mandell: Allright. We will call them windows.

Q. Mr. Mandell: Did water come through the windows? A. Yes, sir, occasionally, when it is rough.

Q. Those windows are dogged down, aren't they? You can close them real tight, can't you? A. Yes, sir. That is right.

Q. And they have rubber gaskets around them? A. Yes, sir.

Q. What is the rubber gasket for? A. The rubber gasket is supposed to stop the water from coming in.

Q. It is supposed to be water tight to keep the water out?

A. Yes, sir.

Q. Did it keep the water out? A. Not all the time, no, sir.

Q. Now, when it didn't keep the water out, what would the water fall onto? A. The water fell on the floor and then they have a scupper pipe to take care of that.

Q. Did it fall on the steps? A. Sometimes it did, yes, sir.

9 Q. Now, I suppose that happened when you had seas splashing against the window or port holes or whatever you call them.

Mr. Bolton: We object to that as calling for a conclusion of the witness.

The Court: Overruled.

Mr. Bolton: Note our exception.

A. That is right.

Mr. Mandell continued reading from Deposition beginning Page 105, line 9.

Q. Mr. Mandell: Is that true or not? A. Yes, it could be.

Q. And that is the reason, is it not, Captain, why these gaskets are around those windows or port holes, in order to keep water away either from the deck or from steps? That is true, isn't it? A. That is true.

Q. Yet I believe you did testify, didn't you, Captain, that on occasions when you had water sufficiently rough to be against the side of the port holes or windows or whatever you call them, why water would at times get on those steps and on the deck? A. That is right.

Q. Now, these steps that we are talking about are the steps leading from the passengers' lounge to the galley below? A. I guess that is what you are talking about.

Mr. Bolton: What was his answer, please?

(The last answer was read.)

A. He has been talking of steps.

Q. Mr. Mandell: Those are the steps I am talking about. A. I say I assume that is the steps he is speaking about.

Q. Anyway, the answer you gave me had reference to those steps, did it not? A. I imagine so. That is the only steps we have except two little steps from the pilot house to the lounge floor.

Q. All I am trying to find out is this: When I was talking about the steps, you understood I was talking about the steps from the passengers' lounge to the galley? You understood that, didn't you? A. Yes, sir.

Q. Now, Captain, if you were to walk from the passengers' lounge to the galley, which way would you be facing?

A. Well, that would be depending on which way you go down the steps, because you can go backward or forward.

Q. Well; which way do you go? A. Well, frankly, I can't answer that because I am so accustomed to the steps I don't even notice them.

Q. Well, if I were a deckhand or an engineer on your boat and you were in the galley drinking coffee and you saw me walking down looking forward— A. Yes,

Q. —would you stop me? A. Well, not unless you was just a new man. If you had been with me some time, well, it is understood that you should know how to go down the step.

Q. Well, Captain, you are just looking at me; sitting right there with a cup of coffee in your hand, looking straight at me. Would you see anything wrong in me walking down those steps looking forward? A. Well, yes, I would say the safest way is to go down backwards.

Q. Is that the way you go down? A. No, I just said that a while ago. I don't even know which way I go because I am accustomed to the step, but I mean—

Q. Why do you say—I am sorry. I didn't mean to stop you. Why do you say that you would go down the steps backing up? Why do you say that is the safer? A. Well, because those steps is somewhat like a ladder and everybody goes down a ladder backing up. Like I said, they don't do it, but that would be the safest way.

Q. Well, when you talk about a ladder you are 12 talking about about a stepladder, aren't you? A. Yes.

Q. Now, on a ladder you can put your foot, the ball of the foot, the center of the foot right on the rung, can't you? Answer out loud because the reporter is not looking at you. Did you say yes? A. Yes, sir.

Q. And the ball of the foot would be resting on the rung and the front of your foot would be sticking out, wouldn't it? A. That is right.

Q. Now, you wouldn't be able to stick it out on the steps leading from the passengers' lounge to the mess room or to the galley, would you, because that has a piece of steel right behind it, doesn't it? A. That is right.

Q. So the safest way to go down that step is to have your foot and your heel right on it, looking forward?

Mr. Bolton: We object to that as calling for a conclusion and invades the province of the Jury.

The Court: Overruled.

Mr. Bolton: Note our exception.

Whereupon Mr. Mandell continued reading from the deposition, Page 107, line 17.)

13. Mr. Bolton: Object to it as calling for a conclusion.

Q. Mr. Mandell: Isn't that correct?

Mr. Bolton: And leading.

A. Well, you couldn't stick your heel any further than you could the front of your foot on those steps.

Q. Mr. Mandell: Then you would at least see where you are going, wouldn't you? A. If you was looking forward, you mean?

Q. Yes. A. Yes, sir, if you were looking at the step while you were going down.

Q. You would be in a much better position, would you not, in walking down those steps by looking forward than by backing up? Wouldn't you, Captain? A. Well, as I said, if you were looking at the step you could probably see better going forward.

Q. Why certainly. And you don't remember now which way you go down, whether you go down forward or backward? A. No. I have been doing it so long. As I say, If I would try to tell you which way I go down, I wouldn't be right, because I just don't remember.

Q. Now, Captain, you have been out on that boat many times when the weather was rough? A. Yes, quite a few times.

14 Q. If you have to go pick up some men on a barge or on a drilling rig and the weather is rough, why that doesn't stop you from going out there, does it? A. No, sir. There is very few times it has been too rough to stop us.

Q. In other words, that boat is designed to be used in weather conditions even though they are rough, isn't it? A. I am sorry. I didn't quite understand you.

Q. That boat is built to be used even in rough weather, isn't it? A. That is right.

Q. Do you ever remember being caught in a hurricane in that boat? A. No, I haven't been caught in a hurricane in it.

Q. Do you ever remember being in water on that boat where you were afraid you couldn't make it? A. No, I haven't.

Q. Now, you might have stayed in or did you ever stay in and not start on a voyage because there was going to be a big storm? A. Well, it has been a few times when they wouldn't let us go out.

Q. That is right, but as many times as you have gone out, do you remember of any time having been caught in a bad storm? A. No. We have never been caught in a

15 bad storm out there.

Q. Do you remember the time when you signed the logbook showing that Mr. McAllister received an injury or slipped and fell and twisted his back? A. Yes.

Q. Do you remember the weather conditions that existed at that time? A. Well, I don't know exactly. When Mr. McAllister told me that he fell down the step, I told him to put it in the logbook that it happened.

Q. Well, if it is recorded on the same day that it happened, then he must have told you that it happened on the same day? A. It was put in the same day that he told me it happened.

Q. And if your logbook shows it happened on October 19, 1950, then it must have happened on the same day? A. Well, it is right that he put it in there on the day that he told me.

Q. That is right. I will show you the logbook. That has your signature, doesn't it? That is your signature? A. Yes.

Q. And it says, "R. A. McAllister slipped on wet ladder steps leading from lounge to the galley. Twisted back and left shoulder." Signed with your name. Now, under what date is that entry? A. That is the 19th.

Q. October 19, 1950, and about a line and half below this you have, "Friday, October 20", don't you? Is that written in there, "Friday, October 20, 1950?" A. Yes.

Q. So by looking at the logbook you know that this matter was reported to you the same day that it happened, according to this logbook? A. According to the logbook, yes.

Mr. Bolfon: We object to the two questions and answers, (Line 4 through 14) and ask that they be stricken for the reason that they relate to a time approximately four years after the occurrence of the event, and they are too remote to have any evidentiary value at all:

The Court: Sustained.

(Pages 112, lines 4 through 13, copied for Bill of Exception.)

Q. Do you remember when you had that boat in for repairs and you got a carpenter to fix it so that it would stop leaking so much water through the port holes? A. It was in for repairs last year. Last summer.

Q. One of the troubles was that it was leaking water through the port holes? A. Well, we give the whole cabin a general repair last summer, yes, sir.

Q. Was one of the troubles that it was leaking water through the port holes?

(Whereupon Mr. Mandell continued reading from the deposition.)

A. It was leaking water through some of the port holes and general repair all over the cabin. I mean all the windows.

Q. As a matter of fact, in one instance, Captain, you yourself put something around these port holes to stop the water from splashing on these steps? Do you remember that? Do you know what dum dum is? A. Yes.

Mr. Bolton: We object for the reason that it is too remote and should not be determined whether it was connected with the occurrence in question.

The Court: Overruled.

Mr. Bolton: Note our exception.

(Mr. Mandell continued reading from the deposition Page 112, line 22, ending Page 115, through line 11.)

Q. Well, I don't. Do you remember putting some dum dum around the port holes or windows to stop the water from splashing on the stairs? A. Yes, sir.

Q. And the reason you did that, you knew it was dangerous for that water to splash on the stairs because somebody might fall and get hurt? A. Yes, sir.

Q. Alright.

Mr. Bolton: I hate to keep interrupting you. We understand that I am objecting to leading questions to the captain?

Mr. Mandell: Yes, sir, and I understand that you just made your objection, even though it came a little late. It doesn't matter.

Mr. Bolton: It comes late, but you can rephrase the question while we are here.

Mr. Mandell: I don't object to it.

Mr. Bolton: What I want to say is this: Do you want me to make that objection to each one of these questions

to the Captain, since it seems to be your position that you can ask him leading questions?

Mr. Mandell: I think I can ask him leading question, if that be a leading question.

Mr. Bolton: Yes.

Mr. Mandell: But I would appreciate you making the objection. But I say this—that I don't mean to say to you that this objection came too late. I knew you were 19 about to make the objection and that objection was timely and properly made.

Mr. Bolton: Well, we understand. The only thing I am asking is that it is your position that you can ask leading questions of the witness because he is the Captain. Then it isn't necessary for me to make but a blanket objection.

Mr. Mandell: I would prefer that we live up to the agreement that we made, that the objections are to be made to leading questions and non-responsive answers. Is that right?

Mr. Bolton: Yes, sir, I understand the agreement, but I hate to interrupt and make objections all the time.

Mr. Mandell: That is all right. You can interrupt me and make your objection any time you want to. I have been interrupted before.

Mr. Bolton: Alright.

Q. Mr. Mandell: Captain, after this entry of October 19, 1950 was made, do you remember Mr. McAllister having trouble with his back? A. Not right away, no, sir.

Q. But you do remember that some time after he did? A. I remember some time after that he told me that he was wearing some kind of protector and it was bothering him.

Q. Do you remember when he went to be operated 20 on for a hernia? A. Yes, sir.

Q. Do you remember that this other deckhand had to help him from time to time because he couldn't do the work like he used to? A. No, I don't remember that.

Q. You don't remember that? As long as Mr. McAllister was working there he was a careful and faithful employee, was he not? He tried to do a good job? A. Yes, sir.

(From the Redirect Examination, Mr. Mandell read from the Deposition, starting Page 116, line 15, through to the end of the Deposition.)

Q. Captain, you have been an alternate mate. By that you mean that you had charge of the boat before you actually became Captain? Is that right? A. Well, what I mean by alternate, there is only one master for one vessel and we work one week off and one week on and therefore, I am alternate Captain and Captain while I am on.

Q. Oh, I understood that you said you were a mate before. Did you work as a mate on these boats? A. Well, I came to work with Magnolia as a mate on one of the tugboats for seven days and then they give me a boat after that.

21 Q. But your experience for a number of years here has been as a captain on these boats? You mean by alternate that you work seven days on and seven days off?

A. Yes, sir.

Q. But your experience has been that of a captain? A. Yes, sir.

Mr. Mandell: That is all.

22 RICHARD ANDREW McALLISTER, the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Mandell:

Q. State your name, please, sir. A. Richard Andrew McAllister.

Q. Where were you born? A. In Mexia, Texas.

Q. What year? A. October the first, 1925.

Q. How much schooling did you have? A. I went to the tenth grade in High School.

Q. And what did you do after that? A. I went in the Navy.

Q. How old were you when you got into the Navy? A. I was seventeen.

Q. Did you do any work any place at all before you joined the Navy? A. No, sir.

Q. When you lived in Mexia and went to school, what did your Daddy do? A. My father was a pumper in the oil field.

Q. All right, did you do any farming at all before you

went into the Navy? A. No, sir, not on my own,
23 I didn't.

Q. Well, did you work on the farm at all, whether it was on your own or anybody else? A. Yes, sir, during the summer school vacation, I picked cotton, chopped cotton, and when I was just a young boy, my father was on the farm in Wise County and I did work on the farm, picking cotton, chopping cotton, various things on the farm.

Q. When you were seventeen, you joined the Navy? A. Yes, sir.

Q. And how long did you remain in the Navy? A. I was in the Navy three years two months and fifteen days, I believe it was.

Q. Do you remember when you were discharged from the Navy? A. Yes, sir, I was discharged on January 26th, 1946.

Q. After you were discharged from the Navy, what did you do? A. I went on the farm with my father.

Q. And where was your father farming at that time? A. Just below Waxahachie, I will say it was about twenty-nine miles south of Waxahachie, a little place called Avalon.

Q. And who did you live with at that time? A. I lived with my father.

Q. Who was living at your father's house, besides
24 you? A. There was my father and my mother and my two younger sisters.

Q. Now, how long did you remain working on the farm with your Daddy when you got through with the Navy? A. I helped Dad get a crop started, and we got it laid by and then I went to California that fall.

Q. Whereabouts in California did you go to? A. I went to Coronado, California to an older brother of mine.

Q. What did you do in Coronado? A. I went to work as a laborer and in a construction gang.

Q. How long did you work there? A. I would say approximately three weeks.

Q. Then what did you do? A. From there, I went to Los Angeles, California. I went to work as a mechanic for the Golden Gate Creamery in Los Angeles.

Q. How long did you work there? A. I worked for Golden Gate for approximately thirteen months.

Q. What sort of work did you do for the Golden Gate Creamery? A. I was a truck mechanic.

Q. Did you repair trucks? A. Trucks and the Company automobiles, yes, sir.

Q. Alright, and then what did you do after these 25 thirteen months? A. I came back home and my Dad was having trouble getting his crop gathered. I came back home and helped my father gather his crop there in Avalon.

Q. How long did you stay helping your Daddy with his crop? A. Well, it was about three months, I would say, until November of that year.

Q. 1940? A. Yes.

Q. All right. What sort of work did you do after you completed helping your Daddy? A. I went to Grand Isle, Louisiana, as an engineer on a 104-foot Army Rescue Boat as second engineer.

Q. And who did you work for? A. That was for Mr. J. L. Taylor in Houston.

Q. And how long did you work as an engineer on those boats? A. I worked for Mr. Taylor, I believe it was thirteen months, sir.

Q. Where did you work after that? A. I went to work for the Magnolia Petroleum Company in Morgan City, Louisiana.

Q. Now, when you went to work for the Magnolia Petroleum Company at Morgan City, in what capacity did you serve, what job did they give you? A. When I first went to work for Magnolia Petroleum, I went to work as 26 a relief engineer on the B. A. Little, a tug boat that the Magnolia owns there in Morgan City.

Q. And how long did you work on the tug, Little? A. I don't know the exact time, I worked on there, I guess, about three months, and then I went off on the Magnolia's other boats as a relief engineer, if someone would go on vacation on the other boats, I would take their job over, just on all of Magnolia's boats.

Q. Did you ever work on the J. C. Stephens, on the Motor Vessel, J. C. Stephens? A. Yes, sir, I was one of the first engineers that went on the Motor Vessel, J. C. Stephens when she came down from Baltimore, Maryland.

Q. Do you remember about when you first started working on the J. C. Stephens? A. Yes, sir, I believe it was November the 21st.

Q. In what year? A. 1949.

Q. How long did you remain on the J. C. Stephens? A. I believe I stayed on the Stephens for two and a half or three years.

Q. Do you now remember the last date of your employment with the Magnolia Petroleum Company? A.

Yes.

27 Q. What is it? A. September the 30th, 1953.

Q. Well, actually working, how long, was it August the 19th? A. Yes, sir; August the 19th was the last day I actually served on one of the Magnolia's Petroleum Company's boats.

Q. Now, in September your relationship was severed, is that correct? A. Yes, sir, I was officially terminated as of September the 30th.

Q. But August 19th was the last day of your employment? A. Yes, sir.

Q. I am handing you here, thirteen pictures, copies of which you have, Mr. Bolton.

Mr. Bolton: Yes, sir.

Q. Mr. Mandell: I will ask you to look at them and see whether you recognize these to be pictures of the J. C. Stephens, on which you served.

(PLaintiff's Exhibits 1 through 13 marked by Counsel.)

A. Yes, sir.

Q. Are these pictures, pictures of the J. C. Stephens and various parts of it? A. Yes, sir.

OFFERS IN EVIDENCE

Mr. Mandell: If it please the Court, we will offer in evidence PLAINTIFF'S EXHIBITS 1 through 13.

28 Mr. Bolton: We have no objections.

Q. Mr. Mandell: Exhibit No. 1. is a picture looking forward on the forward part of the vessel. And Plaintiff's Exhibit No. 2. shows the port on the left side of the vessel. Plaintiff's Exhibit No. 3. shows the star-board or right side of the vessel, looking forward. Plaintiff's Exhibit No. 4. shows the stern or back end of the vessel. Plaintiff's Exhibit No. 5. shows particularly the three windows or port holes over the steps inside that lead from the galley to the room above the lounge off of the lounge to the galley below. Plaintiff's Exhibit No. 6. shows the en-

trance to the lounge from the aft end or the back end of the vessel. Plaintiff's Exhibit No. 7. shows part of the lounge with the chairs upon which the men that are being transported sit and in one place, three steps going up into the wheel house, and the beginning of the steps going down into the galley with one, two, three windows that you see from the outside. Plaintiff's Exhibit No. 8. shows the very beginning of the steps with the hand rail and the place where the first step before you put your foot on the first step, going into the galley. You only see the first step there.

Exhibit of Plaintiff, No. 9. shows part of the steps after leaving the part—only about four steps, the rest of 29 the steps are obscured because of this table in the galley. We will have another picture showing that. Exhibit No. 10. shows part of the galley and the table and shows some of the _____ here on the walls covered with aluminum which will be explained later on.

Plaintiff's Exhibit No. 11. shows the part that we could not see before in No. 9. You see the picture is taken from an angle showing all of the steps going down in a flooring on a decking in the galley. Plaintiff's Exhibit No. 12. shows the wheel house above the galley and a place to sit down and a place for standing on your feet, and Plaintiff's Exhibit No. 13. is part of the flooring looking down on the wheelhouse with mats here and there above the lounge as well as above the galley.

Q. Mr. Mandell: What was the J. C. Stephens used for during the time that you were employed as engineer for them? A. The J. C. Stephens was used for transporting personnel to and from rigs to the shore and back with the Magnolia personnel and equipment.

Q. What was your job, what duty did you have about that vessel? A. My duty aboard the J. C. Stephens was 30 as engineer, was seeing that the engines were in proper working condition, as to all maintenance in the engine room, cleaning my engine room:

Q. Who had charge of the navigation of the vessel? A. The Captain, sir.

Q. And who aboard the vessel had charge of keeping the galley and the steps leading from the galley to the lounge, and the wheelhouse clean? A. The deckhand, sir.

Q. Was the Stephens equipped with places for sleeping quarters? A. Yes, sir, we had sleeping quarters for four men in the forward peak of the vessel.

Q. Now, I have shown you some of these pictures and I am particularly calling your attention to Plaintiff's Exhibit No. 5. Now, you notice this three windows here or port holes—will you please tell the jury, over what area inside of the vessel were these port holes looking onto? A. The two port holes here are leading directly above the ladder leading from the lounge to the galley below.

Q. I show you Plaintiff's Exhibit No. 7, and ask you if you can show the jury, by keeping both of these pictures, one on top of the other, like this.

Mr. Bolton: Which two windows did he say were right over the ladder?

31 Q. Mr. Mandell: Will you please point out which two windows were right over the ladder? A. All three of them, these two and this one, are actually right above the ladder. This one is sort of behind the ladder right above, and these two here are right above the ladder.

Q. Alright, now, looking at Plaintiff's Exhibit No. 7, can you find that inside of these three windows? A. Yes.

Q. Can you point out those for us? A. That shows the inside looking forward on the two here. This one here is the inside of this window here.

Q. Now, when you say, "this window here", you are speaking about the window right above the "S" in Stephens? A. Yes.

Q. And the two windows you are talking about are immediately below the—say up to the letter "e" of J. C. Stephens?

Mr. Bolton: There are two "S's" in Stephens.

Q. Mr. Mandell: If you are walking on the steps going down, which of the windows are immediately above you? A. If you are going down the ladder?

Q. Yes, sir. A. These two here are directly above you as you go down.

32 Q. Alright. Now, I will show you a picture that has been introduced in evidence and marked Exhibit 8. Do you recognize this picture? A. Yes, sir.

Q. Alright. What is this thing that looks like a hand railing, where does it begin and where does it extend to? A. That is an aluminum hand rail on the port side of the

vessel, right along side the ladder going down to the galley.

Q. Does this hand rail extend all the way down to the end of the steps, of the stairs? A. No, sir, I would say it goes about two-thirds of the way down.

Q. Now, do you notice also on the same Plaintiff's Exhibit No. 8, you see a little bit of a beam that runs port ship? A. Yes,

Q. From one side to the other? A. Yes.

Q. Do you notice that? A. Yes, that is—they call that a grab rail.

Q. Well, talking about the beam there. A. Yes, sir.

Q. And the grab rail is on this beam? A. Yes.

Q. Now, if you are standing on the deck before you step down on the first step below, from where you are standing, I believe you say this handrail is on your left? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. Can you, like any person of ordinary height and ordinary size hands reach for the grab rail back here? A. No, sir, you couldn't reach it from the top landing of the ladder.

Q. When can you reach it? A. Well, you could reach it fairly easy from about the third step down.

Q. You would have to walk one, two, three, and then you can reach it, is that correct? A. Yes, sir.

Q. On the occasion that you served on the Stephens, was this the kind of job that you served on thirty days of the months or thirty-one days? A. No, sir, we worked seven days straight, twenty-four hour call and then we were off for seven days, at which time we would go back for another seven days. We would work seven days and we were off seven days.

Q. Where were your headquarters? Where would you leave from? A. Morgan City, Louisiana.

Q. And where would you go? A. Well, we would go down the Atchafalaya River out into Atchafalaya Bay, into the Gulf to the Magnolia Drilling Barges or whatever Magnolia might have out there that they would want to send us out to.

Q. Well, what would you go there for? A. Well, the reason we would go out there would be to change the crews on these drilling barges, but we have gone out there just

with supplies, just take a load of supplies out to one of the barges.

Q. How often would you go out? Would you go out once every day or once every week or what? A. No, sir, we went every day. As a rule, we would go every day. There would be times when maybe we would miss a day, if we didn't have a regular schedule through run and there wasn't any supplies or anything to take out, and we would usually say that we would run every day.

Q. During the time that you have been going out with the J. C. Stephens to the various rigs, did you ever have occasion to go into crossways, or spray to hit these footholds shown in Plaintiff's Exhibits Nos. 6. and 7.? A. Yes, sir.

Q. No. 5. and 7, I am talking about these two, these two that I am pointing at over here. A. Most any time 35 that we would go in the Gulf, the spray would hit the bow, the waves would hit the bow, they would break and the spray would come over the boat.

Q. When that happened, what, if anything happened to the area immediately below the footholds or windows, or whatever you may call them? A. It would get wet.

Q. What would get wet? A. Well, the deck, the bulkheads, the ladders, anything that might be below those port holes would get wet.

Q. Now, which ladder are you talking about? A. The ladder leading from the passenger lounge to the galley below.

Q. Is that ladder the stair as shown in Plaintiff's Exhibit No. 11? A. Yes.

Q. This is the stairs that you are talking about? A. Yes.

Q. Did you yourself have any occasion to see any sea water landing or hitting or raining on the stairs leading from the lounge to the galley? A. Yes, sir, I have seen it any number of times, any time that we would get out into the Gulf where the spray would hit us, it would come through.

Q. Was that condition reported by you to the Master of the vessel? A. Yes, sir.

Q. Were you present when the condition was reported by the Master, to any of the officers of the Magnolia Petroleum? Just answer that yes or no, and then we will go into it. A. Yes, sir, I have.

Q. Did you receive an injury or did something happen to you while you were on the J. C. Stephens? A. Yes, sir, I hurt my back on the J. C. Stephens.

Q. Tell us, Mr. McAllister, if you recall, when I asked you before whether you were present when a report on the leaky condition of the port holes was made to an officer of the Magnolia Petroleum Company; was that before or after the incident of your injury? A. Well, it was before and after.

Q. Let's talk about before, now. Do you know to whom—I am talking about what you yourself have seen and heard, and in your presence, to whom those reports of the condition of the port holes were made? A. Yes, they have been made to the Marine Foreman.

Q. Who is that? A. Mr. Dusty Rhodes, and also to the Marine Foreman that we have now, Mr. Dupree.

Mr. Bolton: We would like to object to and have stricken any reports that were made to the Marine Foreman 37 now, unless they show the date or time with reference to the date that they claim the injury occurred.

Mr. Mandell: I am getting to that, Your Honor.

The Court: Alright.

Q. Mr. Mandell: I am talking about, Mr. McAllister, of the reports, that you know, of any that were made in your presence before the time of your injury. A. Oh, that was made to Mr. Rhodes.

Q. Was it ever made to this gentleman whose name you mentioned a minute ago, before you were injured, that is the question. A. No, not before.

Q. Well, we are limiting it only to the time before you were injured. A. No, sir, not to Mr. Dupree.

Q. Was it made to Mr. Rhodes? A. Yes, sir.

Q. Now, tell me when you started working on the J. C. Stephens, were those port holes, so that you could open them? A. Yes, sir, we could open them, but seldom ever.

Q. Well, I will get to that later. Were they so that they could open them? A. Yes.

Q. How did you open them? A. Well, they had 38 dogs holding them down. They just unscrew the dogs and lift them up.

Q. When the vessel first came, and after I believed you testified it was leaking, what kind of dogs did that vessel

come equipped with?.. A. When I first came down there, it had the cast aluminum dogs around the ports.

Q. After some time you were on that vessel and after you were injured, what happened to those cast aluminum dogs?

A. They froze up, the electrolysis and corrosion from the sea water, they froze and twisted off.

Q. When they twisted off, did you have occasion to examine the frame, the inside frame of the port holes next to the glass? A. Yes, sir.

Q. What was the condition of that frame? A. Well, all around the ports where the water had been leaking, it had started—it would just sort of oxidize and get soft, and the seams were opening up.

Q. What was the condition of the gaskets around there after that condition developed? A. Well, the gaskets—we couldn't line them up no more. The electrolysis built up, the corrosion behind would push them out to where we couldn't keep them flat.

Q. Do you remember when I read this deposition of the Captain, and he said something about dum-

39 dum? What is dum? A. That's a plastic base material,—you sort of use it like a paste, I guess you would say.

Q. Is it a caulking material for caulking the windows there? A. Yes, it is a plastic caulking compound.

Q. During the time that you were aboard the vessel and before the time you received the injury, did you yourself see the Master attempting to use this dum or caulking material to stop the leakage? A. Yes, sir, I have.

Q. Did it stop the leakage? A. No, sir.

Q. Now, at your request, what type of dogs were finally used? A. I had some brass ones made.

Q. Did you use those dogs and attach them to the port holes or windows? A. Yes, sir, I installed them myself.

Q. What happened when you would attempt to tighten these brass dogs so as to make these port holes or windows water tight? A. Well, I could tighten the dogs down. I had them made to where I could put a wrench on it here and pull them down, but after I got them tight, the

40 frame of the window or the dog receivers, that is made onto the side of the window frame, it buckled, pulled it down and the window frame itself would buckle.

Q. Now, when it would buckle, what would happen every time water would hit the port holes? A. Well, after it had buckled out, the water could come in around the glass itself, between the glass and the frame.

Q. Did you yourself see the water come in? A. Yes, sir.

Q. Do you know what the window frame was made out of? A. Well, yes, sir, it was some sort of cast aluminum.

Q. Well, was it aluminum? A. Yes, it was some aluminum material.

Q. Do you know what the upper structure of the vessel was made of, speaking of the upper structure by the white line? A. Yes, sir, everything above the weather deck was aluminum.

Q. Did you notice what the condition of the overhead bulkhead or ceiling as we landlubbers would call it, in the galley? Did you notice the condition? A. Yes, sir.

Q. What was the condition? I am talking about again prior to October the 19th, 1950, before you received the injury? A. Well, I would say in the ceiling of the galley we had these perforated aluminum sound proofing, 41 I guess you would call it, put up there for sound proofing, and behind that, we had this rock wool insulation, and when we would get in the seas, the water would come through. It would drift from all these little holes in this perforated aluminum, onto the galley deck and the steps, the stove, table, anything, our bedding and all got wet.

Q. Now, I am showing you Plaintiff's Exhibit No. 10, which shows a bulkhead or the wall of the galley. Do you recognize it? A. Yes, sir.

Q. Now, on looking at this, do you see some of this perforated aluminum you are talking about? A. Yes, sir.

Q. Is there any difference between the type of material, so far as you know, that is on this bulkhead with the material that you had on the overhead ceiling in the galley? A. Well, it used to be the same.

Q. I am talking about before October 19th, 1950. Was it the same like this? A. Yes, sir.

Q. Now, then, you notice down here they have sheets where they come together, do you notice it? A. Yes, sir.

42 Q. These sheets that we are talking about shown in Plaintiff's Exhibit No. 10.—were they put to-

gether similarly, the same way on the ceiling of the galley?

A. Yes, sir.

Q. And did you yourself notice water coming through the upper deck through the ceiling and onto the galley?

A. Yes, sir, I have on various occasions.

Q. So that the jury may understand what we are talking about, do you recognize this to be a United States Coast Guard photostatic map of the area shown from Morgan City down to the various places that you would go? A. Yes, that is the same waters.

Q. Would you point out to the jury where Morgan City is? A. This, (Pointing on Plaintiff's Exhibit 14.) is Morgan City, on the Atchafalaya River.

Q. Show which way, the course that your boat generally followed in order to get out to the various locations of the Magnolia Petroleum Company. A. Well, we would take two routes—if it was in the daytime, we would go down the Atchafalaya River through the Atchafalaya Bay and out by this light house.—there's a Coast Guard light house there right at the Channel.

Q. What's the name of this island? A. That's Eugene Island light house.

Allright. A. And there is a beacon, on out
43 to—well, Number Seven Beacon would be the first
beacon out, and from this point here we went to—

Mr. Bolton: If the Court please, we object to his testimony about anything out in the Gulf unless he connects it up to show his injury happened out beyond Number Seven Beacon.

The Court: Objection sustained.

A. Well, from this point here, we were going in any direction out. We had rigs all out in here over as far as there is a ship show light, back over here. That's March Island.

Q. You did go out into the Gulf of Mexico wherever those locations were? A. Yes, wherever they might have their location.

Q. During the time that you went out to these locations, did you have occasion to meet the type of weather that caused swell or spray to hit these windows or port holes that we have on the port side of the J. C. Stephens, that you have shown to the Jury? A. Yes, we very seldom ever

went out that there wasn't enough spray to wet the boat, —well, from the forward part of the cabin most any time we would go out, we would get wet from the spray, or the waves breaking against the bow and the wind bringing it over.

Q. Now, then, did you see, besides yourself, at-
44 tempting to fix these dogs and the Master of the ves-
sel attempting to caulk these windows, did you see anyone else before October 19th, 1950 attempting to work on these port holes or windows, trying to stop the water?

A. Yes, we had a carpenter there in the yard that worked on them several times.

Q. What is his name? A. Mr. E. C. Smith.

Q. You say you did see him work there? A. Yes, sir, I helped him at different times, we would work on them?

Q. Explain as far as you know, from the day that you joined the J. C. Stephens until you left them,—was the frame of that port hole or window ever changed? A. No, sir.

Q. Directing your attention to the time that you say you received your injury to your back, which so far is shown to have been on October 19, 1950, when did you leave Morgan City immediately before this accident or injury took place? A. Well, the injury took place on a Thursday. We left Morgan City Wednesday morning, the morning before.

Q. Alright, now, did you leave in the morning about what time? A. Well, as near as I can remember, we 45 left around noon Wednesday.

Q. Where did the J. C. Stephens go? A. I believe we went to Block 126, which is just almost due south of Number Seven Beacon.

Q. You mean further out than Number Seven Beacon? A. Yes.

Q. Now, Number Seven Beacon, I believe you pointed out, is substantially somewhere around here where I am pointing? A. Yes.

Q. Well, not here. Over there, approximately the spot. Mr. Bolton: Well, it appears on the map, Mr. Mandell. Mr. Mandell: All right.

Q. Now, that is of course—and that was further out, you say, down there? A. Yes, it was about twenty miles, I would say, past Number Seven Beacon.

Q. And what was your purpose of going to Block 126 on that day? A. We carried a crew, a roughneck crew out to Block 126 to switch crews.

Q. Whose roughneck crew was it? A. Magnolia Petroleum Company.

Q. All right, and did you pick anybody up there? A. Yes, sir, I don't remember just how many, but we did 46 pick up a crew there at the time that we brought the other crew out.

Q. Is that what you generally did, or usually do? A. Yes, sir, we bring a crew out and they go to work and then there is a crew getting off and we bring them back to town.

Q. Now, did you vessel at that time, move along side or tie up along side a drilling rig? A. No, sir, not the rig itself. The barge—the drilling barge is pulled up to the rig and we tied along side the barge.

Q. You tied up to the barge? A. Yes.

Q. You let the men off and took some on? A. Yes, sir, as I remember it, that is where we went.

Q. Where did you take these men? A. We brought them back to this light house, this Coast Guard Light House at Eugene Island.

Q. What you call Eugene Island? A. Yes.

Q. And I will mark it Eugene Island. Did the men that you brought from Block 126 get off at Eugene Island? A. Yes, sir.

47 Q. What did you and your crew do? A. We went to bed after that crew got off.

Q. And how long did you remain tied up at Eugene Island? A. As I remember, we left Eugene Island at two o'clock Thursday morning.

Q. And where did you go? A. To Number Four drilling barge anchored off of Number Seven Beacon.

Q. You went to Number Four drilling barge at Number Seven Beacon, is that the place we marked on the map which is Plaintiff's Exhibit No. 14? A. Yes, sir.

Q. What did you do then? Did you tie up there? A. Yes, sir, we tied up there for a few moments. We pulled along side. I believe we pulled along side and we picked up six men, I believe, six or seven.

Q. You pulled along side what? A. This Number Four drilling barge.

Q. Now, then, have you ever seen those drilling barges from time to time that you have been on it? A. Yes, sir, I have been all over them.

Q. And did you notice the condition of those drilling barges? A. Yes, sir, I have.

Q. Generally what is their condition? A. Well, 48 they are throughout the inside of the barge, you mean?

Q. On top of the barge. A. Well, on top there is about fourteen feet, I guess, above water. They have an outside weather deck. They store various things that they use on the drilling rigs. Inside—well, on the weather deck there, one of the parts of the boat that gets wet, a kind of weather deck, is where they have all of their mud rooms, the mud pumps and all of the machinery that they use to operate the drilling rigs.

Q. Did you notice whether or not many times you have been there as to what the condition of the barges were, whether they had any oil or grease or anything on them? A. Yes, sir, in the pump room, or it is termed the mudroom, why it is always slushy, with drilling mud that they mix and the mud pump, then the oil from all of those. They have a lot of engines in there on this same level.

Q. Can you tell the jury what kind of weather you had when you first went out on October 18,—I believe you testified you went out the day before, didn't you? A. Yes, sir.

Q. What was the weather that day? A. Well, it was, the day before, it had been a little rough, but it wasn't too bad, not near enough to keep us from going out.

49 Q. In any event, what was the weather condition while you were tied up there at Eugene Island? A. Well, it was sort of a tail-end of what they call a tropical disturbance there, I guess. It was calming down and the weather was getting pretty good.

Q. Well, what I am trying to get you to tell the jury is, whether it was getting worse or more intense or was it sort of calming down as compared to the time you first went out and the time you left Eugene Island to go to Number Seven Beacon. A. Oh, it had calmed down quite a bit. It was passing over.

Q. Notwithstanding the fact that it was calming down, can you tell us whether or not, keeping in mind that this was small craft and inland water, was it still considered

rough weather? A. No, sir, not in there where we were. We were; from where that lighthouse there is—it is shallow water—well, what we term "Protected water".

Q. Keeping in mind the kind of weather that you had at that time, did you have any of the spray or seas hitting the port holes, particularly the port holes over the area that we have shown above the ladder leading to and from the galley? A. Yes, we still had some wind and a spray.

It don't have to be much of a spray, if you have got 50 a little bit of wind, it all goes together and carries it around.

Q. When you are engineer in the engine-room, where is your duty, where are you supposed to be at all times? A. Well, I am either in the engine-room or right at it.

Q. At the time that the vessel tied up at Eugene Island, who actually tied up the vessel, about two o'clock or four o'clock in the morning maybe, how long did it take you to get from Eugene Island to Number Seven? A. It is about a forty-five minute run. It is not very far, but it is in shallow water, and you have to run slow.

Q. That is if you left about two o'clock; approximately when would you say that you reached Number Seven Beacon? A. Well, we would get up at two and maybe we would get under way by about two-thirty, warm the engines up and then we would get under way probably a little after three o'clock.

Q. Sometime between three-thirty and four o'clock you were at the Number Seven Beacon? Is that correct? A. As near as I can remember, yes, sir.

Q. I believe you testified that you had to tie up to those barges over there? A. Yes, sir.

Q. Who tied up the vessel? A. The deck-hand and myself.

51 Q. Where would the deck-hand go to? A. The deck-hand takes the bow-line and the engineer catches the stern-line. It makes it a lot easier for the Captain to have two men to catch the lines instead of just one.

Q. I am showing you Plaintiff's Exhibits Numbers 3 and 4. I want you to show this jury where you were standing when you were tying up to the dock. I am showing you now, Plaintiff's Exhibit No. 4. A. Well, I would usually stand inside the well deck here, if we would cast the line

on the port side, I would be here, and if I caught the line on the starboard side, I would be back along here.

Q. Do you now remember which side you were on? A. As I remember, I was on the starboard side,

Q. So you were on the side where the flag is? A. Yes, sir.

Q. And where was the deckhand? A. He would be up here on the bow.

Q. Do you remember whether it was necessary for you to get out on the outside in the weather or were you able to stay inside and underneath that canopy? A. Well, when we would come alongside, why they always have the deckhands on the barge—would blow the whistle as you get there, and the deckhands would come out,—which they would throw him a line and then they would make it fast over there, and on the Stephens they don't make it necessary for us to get out.

52 Q. Well, is it your testimony then that you did or did not get out? A. No, sir, I did not.

Q. You did not get out? A. No, sir.

Q. Allright, sir. When you let go the lines, did you also help let go the lines? A. Yes, sir.

Q. And did you find it necessary to get out on the weather-deck—I am talking about—well, did you actually stand inside underneath that canopy or did you have to go out on the weather-deck? A. No, sir, when I catch the lines there, I throw my line from inside and I don't use that aft-bit, I use the stern-quarter bit. That stern-quarter bit is just maybe twelve or fourteen inches inside of the well decks.

Q. About how long did the operation take tying up and letting go the line, picking up your men? A. Well, from the time that we came along side, tying up, getting the men aboard and letting it go, it would be maybe five or six minutes.

Q. Allright, sir, when you got through your job, where was your station next, when you got through letting 53 go the line? A. In the engineroom.

Q. Allright, in order to get to the engineroom, what route is there available to you? A. Well, I would leave the well deck and I would go through the passenger's lounge and into the galley and then back aft to my engine-room.

(Recess)

Q. Mr. Mandell: Mr. McAllister, in order to get back—by the way, I believe you said that you helped tie up. Why did you have to go back to the engine room? A. Well, that is my job in the engine room. Well, they were my responsibility.

Q. Now, then, what route did you follow to get to the engine room? A. I went from the aft deck there—we all go through the passenger lounge and down to the galley.

Q. Now, then, speaking going through the passenger lounge, is that part of the aft port which is covered up by a canopy, is that correct? A. Yes.

Q. As shown in Plaintiff's Exhibit No. 6? A. Yes.

54 Q. And you walk into the lounge? A. Yes, that is the passengers lounge.

Q. And then down to the galley shown in this picture over here right next to the lounge? A. Yes, sir, that is the passengers lounge there.

Q. And then down there into the galley? A. Yes, sir.

Q. From the moment that you stepped out, began to step out from the passengers lounge onto the first step of the galley, I want you to explain to the jury exactly what happened. A. You mean from the time I did what?

Q. You walked from your station—when you let go the line, you walked into the lounge, did you not? A. Yes, sir.

Q. You walked forward into the lounge until you get to the part to walk into the galley? A. Yes, sir.

Q. Allright. Now, at the time, I believe you testified, that the weather was such that sprays and seas were hitting the port holes right over the steps leading to and from the galley? A. Yes, sir.

Q. Now, then, I want you to tell the jury exactly what happened from the time you stepped from the lounge onto the first step, on the stairs leading to the galley?

55 A. Well, first from this approach, there is a little vestibule-like right there above the ladder, and I stepped onto the ladder, that has got this hand rail right by the side of it. When you are walking down, why you just grab the hand rail and you step, and as I stepped, my foot just slipped right out from under me and my heels

hit on the ladder going down and they have a fire extinguisher right on the bulkhead there, right after you get to the bottom, and my shoulder struck that, as I went down with the force of my fall, pulled me sideways—I lost my grip on this handrail and my feet hit the deck and then I went on down—and then my seat, and right after that—there was a galley table; and my feet went in under the galley table, and that is where I stopped.

Q. When you fell, what part of your body hit the deck?

A. My heels and then my seat.

Q. You mean you just sat down hard? A. Yes.

Q. Now, did you feel any pain at that time? A. Yes, sir, when I hit that, well, I didn't feel my shoulder so much, well, I didn't even notice my shoulder right then. My shoulder got sore afterwards, but the pain that I felt was right in the small of my back. I had a—well, like a burning sensation there, and my legs were numb. 56 I was sort of stunned-like.

Q. I am showing you here Plaintiff's Exhibit No. 11. Is that the fire extinguisher you are talking about?

A. Yes, sir.

Q. And what part of the deck did your buttocks hit?
A. Right here at the foot of the ladder.

Q. And your feet went underneath that table? A. Yes.

Q. Now, what did you do after you fell? A. Sir?

Q. What did you do? A. After I fell?

Q. Yes. A. Well, I got up. We have some chairs there around the galley table and I sat down for a while.

Q. Who was there when you fell? Do you remember?
A. Well, the deckhand was right behind me; Mr. Ashton was our deckhand at that time. He was coming down right behind me and he helped me up and I sat down in a chair there and I stayed there for a while and I got up and got straightened up and went on into my engineroom.

Q. Did you have occasion to go look at the stairs from which you slipped? A. Yes, Mr. Ashton and I looked at it.

57 Well, if you slip on something you are curious to know what you slip on, and Mr. Ashton and I looked at the step. You could see the imprint of my foot where it slipped off. Well, I passed my hand on it and it was oil, a sort of a film-like of oil and water on the step.

Q. At that time did you notice whether or not water was coming through the port holes above these steps? A. Sir, it was coming through there and the deck above too.

Q. In view of the weather condition that existed at that time or at any time when you have that pitching or rolling of the vessel because of the weather condition, is there any way that either you or anyone else could keep those steps clean from water or anything wet? A. Well, no, sir, not unless you just stood right there with a mop and just continuously mopped. When the boat would roll and that water would splash in, if you would just stand there mopping it would be the only way to keep it up.

Q. After you inspected it and saw the condition of the stair with water and oil on it; what did you do? A. I went on into my engine room.

Q. What was the condition of your back at that time? A. Well, after I sat there for a while, when I got up, I couldn't stoop. I would have to squat down. The passage or port hole or hatch, they would call it, going into my engine room--well you have to stoop to go in, and after that, I couldn't stoop or bend over. I had to just squat, bend my knees and lower my head, you know, as you go through.

Q. Did you ever have any such difficulty with your back before? A. No, sir. I had never had my back in that shape before.

Q. Now, Mr. McAllister, that happened on the 19th, and I believe you said that you came to work to report on the Stephens on the 18th, the day before, was it not? A. Yes, sir.

Q. And I believe you testified that you worked seven days only? A. Yes, sir.

Q. Did you continue working those seven days from Wednesday until the following Wednesday? A. Yes, sir, I worked out there that whole week.

Q. What was the condition of your back from the minute you fell until you finished out there the seven days? A. Well, I never could bend over after that, and I had those pains down the sides of my legs. It sort of paralyzes your leg, like you lose the feel of them, you can't keep your balance.

Q. Alright. Now, during that time were you—state whether the vessel was in any water that had any roll in

which the very vessel rolled and pitched; how were you able to navigate by yourself? A. Well, when we were having those, what we would call a pretty rough sea there and the boat was rolling and pitching, I didn't do so good.

Q. Well, how did you do? A. Well, that pounding of the boat, from the waves hitting it, it jarred the whole boat and the rocking and rolling—just continuously holding on to something all the time you are always under a strain.

Q. What did that do to your back after you got hurt? A. Well, in that type of weather, I stayed pretty close to my bunk. I had this Ashton, the deckhand on there—they would help me out, make my rounds for me, and every hour or so, then I would get up and make the round myself.

Q. Now, when you got home—what did you do after you got home? A. I went to my family doctor.

Q. Who is he? A. That's Dr. Borwnelle there in Morgan City.

Q. That is the same place where the Magnolia has its headquarters there in Louisiana? A. Yes, sir.

Q. And what did Dr. Borwnelle do for you? A. Well, he gave me an examination, put me on his table, and asked me how it hurt me and told me, well, he was going to—

Q. No, wait a minute. You are not permitted to say what Dr. Borwnelle told you, but you are permitted to say what he did to you. Did he give you anything to wear on your back? A. Yes, sir, he taped my back up from—well, up to my ribs down to my rump. At that time, that's all he did.

Q. Did that help you any? A. Yes, sir.

Q. Did you attempt to go back to work? A. Yes, sir, I went back to work the next week.

Q. How did your back feel at that time? A. Well, I still couldn't stoop, or couldn't lift anything heavy. Well, just in my duties throughout the boat there, I had a pretty tough go of it there.

Q. After you rested a while, did your back seem to be getting a little better? A. Well, you can get yourself straightened up and you can get around, not that I would say I got better, but I got myself straightened up and I went about my duties.

Q. Did Dr. Borwnelle finally prescribe something for you to wear? A. Yes, sir, I got a back brace to wear under my clothes.

Q. Is that something that Dr. Borwnelle advised you to get? A. Yes.

61 Q. And where did you get it? A. In New Orleans.

Q. And how long did you wear that? A. Well, I wore it out. I would say it lasted for a year or better.

Q. And when that wore out, what did you do? A. Well, I took my log book.

Q. No, did you finally get another one? A. Yes, sir, I got another belt.

Q. Alright. Did your condition get better or worse as time went on? A. Well, it seemed to get just progressively worse.

Q. Did you finally seek the advice of a specialist in New Orleans? A. Yes, sir.

Q. And who was that? A. That was Dr. Battalora.

Q. Do you know whether or not he was an orthopedic surgeon? A. Yes, sir, he was a specialist in that type of work.

Q. Did he examine you? A. Yes, sir.

Q. Do you remember whether or not that was in March of 1953? A. March the 12; I believe, 1953.

Q. Did you tell your employer where you were going?

62 A. No, sir, I don't—when I got off, I just went over there. It wasn't on—

Q. Alright. After Dr. Battalora examined you, I want you to answer this next question yes or no: Did he advise you what you may have to do? A. Yes, sir.

Q. Alright. Right after you received that advise, did you report back to your employer? A. Yes, sir.

Q. Who did you talk to? A. I talked to Mr. Rhodes.

Q. This gentleman sitting here? A. Yes, sir.

Q. And what position did Mr. Rhodes have? A. I believe he had been advanced.

Q. To what? A. An Assistant Production Foreman, I believe:

Q. Anyway, did you then talk to Mr. Rhodes as the representative of the Magnolia Petroleum Company? A. Yes, sir.

Q. What did you tell Mr. Rhodes at that time? A. Well, I told him what the doctor had said and—

Q. What did you say? A. Well, I told him what this doctor had told me and told him that I wanted to go to the hospital.

Q. Did you or did you not, tell him that you wanted the Company to take care of the operation, that the doctor advised it? A. Yes, sir, I told him that I had had the accident on the job there, on the Magnolia's boat, that I thought that the Company should pay my hospital bills.

Q. What did Mr. Rhodes tell you about that? A. Well, he asked me about my own insurance.

Q. Well, did he say go ahead and have your operation? A. Well, no, as I remember, they wrote me out some slips and told me to go to the Marine Hospital in New Orleans.

Q. When was that? A. I believe—

Q. Was that in July? A. I believe it was—well, before that, he wrote some letters. He was going to write a letter for me to the Company. I believe he wrote a letter to Mr. Lew Ayres, who was a production foreman, I believe he was.

Q. My question is, did the Company at that time make arrangements at any private hospital or with any private physician so that you could have an operation on your back? A. No, sir, I failed to get any arrangement.

Q. That was some time in March, 1953—did your condition get better or worse from March to July? A. No, sir, it got worse.

Q. Did you then again ask your employer for some help with reference to your physical condition? A.

Yes, sir, I had an interview with the District Superintendent and well, he told me about his case, that he had had—

Q. Well, let's not get into some other cases. Let's stick to yours. Now, just tell us whether he did make arrangements for you to have an operation at the hospital or from a private physician. A. No, sir, I still didn't get no arrangement.

Q. Alright, was it at that time that you got a letter from your Company to present yourself to the U. S. Public Health Service at New Orleans? A. Well, it was a little while after that, yes, sir.

Q. Alright, did you at that time, go to the New Orleans Hospital? A. Yes, sir, I went just as soon as I got the slip that entitled me to treatment at the Hospital.

Q. As an American Merchant Seaman? A. Yes, sir.

Q. Alright, did you report to the hospital in New Orleans region? A. Yes, sir, I went to New Orleans.

Q. How long were you kept—I mean were you an in-patient or an out-patient? A. Well, I guess you would call it an out-patient. I went there, they gave me an examination, X-Rays, and told me that they were going to put me in the Hospital there.

65 Q. They told you that they were going to put you in the hospital there. Did you yourself request to be sent to the Galveston Hospital? A. Yes, sir, I talked to this Dr. Wong.

Q. Tell us whether you requested to be sent to the Galveston Hospital? A. Yes, sir.

Q. And why did you do that? A. Well, it would make it a lot easier for my family. My folks live in Houston, and with my wife and children, it would make it a lot handier if they were in—I could leave them with my folks there in Houston, and Galveston is not far from there, if I could just as well go to Galveston, it would make it lot easier on me.

Q. Alright, now, did they transfer you to the hospital at Galveston? A. Yes, sir, I went back to the Company and also requested of the Company that I could go to Galveston, and they made me out a slip to go the Galveston Hospital.

Q. Is this the copy of the slip that they made out? A. Yes.

Q. Addressed to the Hospital in Galveston? A. Yes.

OFFER IN EVIDENCE

Q. This Exhibit is marked Plaintiff's Exhibit No. 15. We offer it in evidence.

66 Mr. Bolton: No objection.

Q. Mr. Mandell: Did you present this to the Marine Hospital? A. Yes, I took it to Galveston and was admitted there.

Q. Were you admitted to the hospital or did you receive out patient treatments first? A. Well, I had what they call an out patient treatment, when I first went there.

Q. How long did you have out patient treatment? A. For two weeks.

Q. And then did they put you in the Hospital? A. Yes, after that, I went in, was admitted as an in patient there in Galveston.

Q. And how long did you remain an in patient there? A. I don't remember exactly.

Q. Was it from Junl 23rd, 1953 until August the 4th, 1953? A. Yes, sir, I believe it was.

Q. At the time when you were discharged from the hospital, did you feel somewhat better after that two weeks there? A. Yes, sir; they took pretty good care of me there and I was feeling somewhat better.

Q. Alright after you left August the 4th, did you then return to your employer? A. Yes, sir, I went back to Morgan City, Louisiana.

67 Q. Did you attempt to work after that? A. Yes, sir.

Q. Were you able to work after that? A. No, sir. I worked a few days.

Q. And then what happened? A. I just couldn't take it, I had to get off.

Q. What hurt you? A. Well, my back and my legs, first one leg and then the other; sometime both legs, sort of paralyzed. I just couldn't get around.

Q. Did you finally have to leave on August the 19th, 1953, have to leave that employment? A. Yes, sir, I left again to go back to the Hospital.

Q. Did you try to get back into the hospital? A. Yes, sir.

Q. Were you able to get back into the Hospital? A. No, sir.

Q. When they would not receive you in the Hospital, what did you do, where did you come to? A. I went to Houston.

Q. Shortly thereafter, did you see a physician in Houston? A. Yes, sir, I saw Dr. Battalora.

Q. In Houston? A. No, sir, that was—Battalora was in New Orleans. I saw Dr. Brodsky in Houston.

68 Q. What kind of a physician is Dr. Brodsky, what kind of work does he do? Is he an orthopedic surgeon? A. Yes, sir, he is an orthopedic specialist in that field.

Q. Alright, have you been under his care since? A. Yes, sir, I have been under his care ever since.

Q. Now, sometime in January of 1954, did you attempt to get back into the hospital, or to obtain hospital treatment? A. Yes, sir, I went back to Galveston and they told me I wasn't entitled to get back.

Q. At that time, after August 19th, 1953, on until January 1954 when you went back to the hospital, did you have any kind of attempt to work? A. Yes, sir, I tried several jobs, tried to get several jobs.

Q. Did you get some kind of work? A. Yes, sir, I went to work at ~~burial~~ park, Brookside Memorial, I believe it was, there in Houston.

Q. Was that the Brookside Memorial Park? A. Yes, sir.

Q. Alright. About how long did you work there? A. I worked there about five or six weeks, I am pretty sure it was.

Q. Now, during the time, what kind of work did you do there? A. Well, I was what they called a maintenance man on law mowers and the little trucks that they use in
69 the cemeteries, dragging equipment around.

Q. Did you operate them or did you keep them in repair? A. No, sir, I repaired them.

Q. Were you able to do that work without any pain? A. No, sir, I had a little concrete shop there. I was the only man, just the one repair man, and I worked in this little concrete shop, concrete deck, and I just finally had to lay off of that job.

Q. Well, did you work continuously five or six weeks or did you have to take off some time? A. Well, I took off one time, yes, sir.

Q. How long? A. I missed three days.

Q. What happened after that? A. They laid me off.

Q. Now, did you work any more during 1953 at all? A. No, sir.

Q. In 1954, did you do any work or try to do any work? A. Sir?

Q. Did you try to do any work in 1954? A. Yes, sir, I tried working as a carpenter's helper.

Q. And who did you try to work for? A. That was a Mr. John Landry. My father got me on there.

Q. How long did you work there? A. About a month.

70 Q. Were you able to do that work without any pain? A. Well, no, sir, they wouldn't—I couldn't get on any scaffold. We were doing just general repair, I couldn't climb the ladder, I couldn't get to the roof to put the roofing on and I laid off, I had to lay off. I believe I didn't miss but a week on that job.

Q. Were you able to do that work without any pain or disability? A. No, sir.

Q. Did you have another job during 1954? A. Yes, after they laid me off there, I went out to the Museum of Fine Arts there in Houston and got on as a janitor.

Q. How long did you work there? A. I worked a week.

Q. Were you able to do that work? A. No, sir, my job there was sweeping and handling these marble statues and the big pictures that weighed a way up in the pounds, just the frame, and I just couldn't lift them. I couldn't move their marble around. I just wasn't able to hold up to it.

Q. Did they keep you on that job? A. No, sir, I went to work on a Monday and on Wednesday morning they told me that they would let me work out the week and then they let me go.

71 Q. I am showing you your withholding statement for 1953—of Richard Andrew McAllister—is this your Social Security Number up here? A. Yes.

Q. 465-22-0197. Now, how much did you earn for the time that you worked that six weeks? A. \$337.05.

Q. Then at John Landry Company, Inc. that you worked for in 1954 about a month, I believe you said. How much did you earn there?

Mr. Bolton: Are you offering that?

Mr. Mandell: No, I am just letting him use that to refresh his memory.

Mr. Bolton: I object to that, to him using that, because he didn't prepare that. I don't want him to refresh his memory from it.

The Court: Do you object to them on the basis that they are not memorandums prepared by this witness?

Mr. Bolton: Yes, sir.

The Court: I will sustain the objection.

Q. Mr. Mandell: Were there any other jobs that you held besides these three? A. No, sir.

Q. Have you earned any other kind of money with the

exception of these—whatever money you earned is
72 from these employers? A. No, sir, I have not.

Q. Now, this work that you did for Landry Company, Inc. and for the Memorial Park and for the Museum of Fine Arts in Houston,—were you able to do that work without any pain or difficulty? A. No, sir, I wasn't.

Q. Now, before October the 19th, 1950, tell the jury what other injuries, if any, you ever received. A. Well, I used to ride a motorcycle before I got married and I had a little brush burn on that, spills, skin your elbows or something like that; and then I had a back injury with Magnolia.

Q. When was that? A. I believe that was in October, 1949.

Q. Now, tell the jury just what happened, what boat were you on? A. I was on the D. A. Little, one of the Magnolia's tugs. We had taken a load of cement out to one of the barges in the Gulf; and the deckhands and the rough-necks off of the barge were unloading this cement, and we would always—the boat crews, if we could, we would give them a hand, and I picked up a load of this cement here—I was helping them shift the piles so it would make it easier for them to pick it up and put on the buckets that

73 they lift it off with onto the barge. I picked up a bag of cement and I turned around and went to place it onto this other pile to where they could pick it up and put it in the bucket, and as I went to set it down, the boat lurched against the line and I lost my balance and I fell over against this stack of cement, and it was what the doctor said was a sprain in my back, a sprain or muscle.

Q. What doctor was this? A. That was Dr. Gueymard at Morgan City.

Q. And what did he do for you? A. He taped my back up and told me I could go back to work.

Q. Did you go back to work? A. Yes, sir.

Q. Did you have any trouble with it at all from that time on until your second injury? A. No, sir, I wore that tape about three days and then I took the tape off and I have ever been bothered with it since.

Q. Did you ever have any other injury to your back except this slight injury of October 1949 and this injury of October 1950? A. No, sir, that was the only times.

Q. Did you ever file a claim before in your life? A. No, sir.

Q. Did you ever have any law suit before in your life?

74 Q. Tell the jury whether there was any other way of your getting to the galley, that early morning of October 19th, 1950, except in going from the actual deck under the canopy into the lounge and down the steps into the galley. A. Yes, sir, I could have gone down either side of the cabin, down the weather deck into the wheelhouse and then from the wheelhouse down into the lounge and then back into the galley and into the engineroom. I could have went down either side of the boat.

Q. Now, speaking about the side of the boat, I am showing you Plaintiff's Exhibit No. 2. Can you point out to the jury what other way you could have gone except the way you did go? A. Well, I could have—out from the well-deck, I could have come up the side of the boat between the cabin and the outside railing of the boat into the wheelhouse and then from a wheelhouse to the lounge and then down.

Q. Now, if you had done so, how much space is there to walk on between the outside edge of the vessel and down to the bulkhead? A. I guess there is about twenty-four or twenty-six inches.

Q. Is there any railing in between? A. No, sir.

75 Q. What was the condition of the weather at that time with reference as to whether or not the boat was rolling and pitching? A. Well, yes, sir, it was rolling and pitching; it wasn't bad. We were in protected waters there, what we call protected water, shallow water, there off of Number Seven Beacon.

Q. Now, what is your practice or what did you do on the morning of October the 19th before you walked into your—into the galley—you stepped on the step, with reference to your shoe. A. Well, I had been out on the deck—that weather that we were having, it was wet—well, I always keep a very clean engine room. That is one thing that I was always particular about, was my engine room, and we have there on the boat some mats, there between three feet long or two feet long, big thick mats.

Q. Something like these shown on Plaintiff's Exhibit No. 13? A. Yes, sir, that looks like the same ones. We keep a mat at each entrance to the boat there to clean our

feet on, and as I got into the boat I cleaned my feet, wiped my feet on my mat there and I walked on down the aisle in the crew lounge, or passengers lounge and then on down to the galley.

Q. While you were under the care of Dr. Brodsky, did Dr. Brodsky have some X-Rays taken of your back? A. Yes, sir.

76 Q. In his own office? A. Dr. Brodsky?

Q. Yes, in his own office? A. Yes; there in Houston.

Q. Now, then, after you had been treated by him for some time, did he have a special test made on your spine? A. Yes, sir, he sent me up to a place there in Houston, Dr. Turner, Turner & White, I believe it was.

Q. What did they do to you over there? A. Well, they put me on this table and ran what they call a myelogram, or something like that.

Q. Well, what did they do? Do you know? Did you feel what they did to you? A. Yes, I could feel it.

Q. Well, what was it? A. Well, they injected this fluid in your spine.

Q. Well, did you feel them stick a needle in your spine? A. Yes, sir.

Q. Was it painful? A. Yes, sir, they had to hold you on there.

Q. Well, anyway, did they give you that test? A. Yes, sir.

Q. And what after effect did you have from that? A. Well, they told me to go right home and lie down just as quick as I could get home. I had brought someone 77 to drive me back home, and I had to call him up that night again to get some medicine.

Q. Well, what hurt you, that is what I want you to tell us. A. Well, it was my back and my head. I had a very severe headache after that myelogram.

Q. Now, Mr. McAllister, from the day that you were injured, October the 19th, 1950, to this date, did you ever have a day that you have been free of pain in your back?

A. No, sir, not entirely. I have good days—well, days when I feel pretty good.—Well, my legs don't bother me, when it is just in my back, I can make it around pretty well.

Q. Even during those days what happens if you walk as much as two or three blocks? A. Well, I just have to sit down. My legs just give out on me.

Q. Are you able to sleep at night, all night? A. Well, sometimes I get a pretty good night's rest. As a rule, I don't rest too well.

Q. What happens then? A. Well, it's just like I can't get comfortable. I can't get in a position to where it just won't quit bothering me.

Q. What won't quit bothering you? A. Well, my back and those pains down my legs.

Q. What happens when you suddenly turn? A. Well, I just don't do that any more. I just don't turn fast. Well, it just shoots those pains down into my legs and into my feet; it just paralyzes me like, and numbs my legs.

Q. I assume that before October 19th, 1950, you sometimes did cough and sneeze, did you not? A. Yes, sir.

Q. Did it ever bother you before October 19th, 1950, when you would either cough or sneeze? A. No, sir.

Q. Now, what happens since October 19th, 1950 when you either cough or sneeze? A. Well, it doubles me up.

Q. Where do you feel pain? A. Well, it is right in the small of my back and down each side of my legs and my feet.

Q. Mr. McAllister, did you ever have any difficulty or any pain in having a bowel movement before October 19th, 1950? A. No, sir.

Q. What happens now when you have to strain yourself during such procedure? Well, I just can't strain. There is pain and I just can't strain.

Q. Do you know of any work that you can do except one involving hard manual labor? A. Well, no, sir, I never did get too good an education, and well, that's just all I've ever done. I just don't know. I am just not mentally equipped or physically equipped to do other than manual labor.

Mr. McAllister, during the time that you were employed, at the Magnolia Petroleum Company, what was your monthly wages during 1953? A. Well, \$405.00 at the time I was laid off, that's what I was drawing.

Q. Per month? A. Yes, sir.

Q. That means that you worked a week on and a week off? A. Yes, sir.

Q. But you got paid for the full month? A. Yes, sir.

Q. And you were on twenty-four hour duty, always on call during the time that you were working? A. Yes, sir.

Q. Now, in addition to that, of course you got your board and room? A. Yes. We got board and—we got \$405.00 a month plus room and board.

Q. Mr. McAllister, when did you get married? A. In 1948.

Q. During the time that you worked for the Magnolia Petroleum Company, did you ever get on these drilling barges with drilling equipment out in the Gulf of Mexico; did you ever see them? A. Did I ever see the barges?

Q. Yes. A. Yes, sir.

Q. Could you tell whether or not they had oil and grease on them? A. Well, yes, sir, they have got oil and grease on them.

Q. During the time, particularly October 19, 1950, when you took employees on October the 18th, to the drilling barge, were they all employees of the Magnolia Petroleum Company? A. Yes, sir, every man on the boat was.

Q. Did you have anybody at that time on October the 18th who was on the boat who was not an employee of the Magnolia Petroleum Company? A. Not to my knowledge, no, sir.

Q. Well, you would know, wouldn't you, if there were others? A. Yes, I know practically everybody that worked for the Magnolia at that time.

Q. At the time on the evening of October the 18th when you took some men off of the drilling barge and brought them to Eugene Island; can you tell this jury whether or not they were all employees of the Magnolia Petroleum Company at that time? A. Yes, sir, there were.

Q. And at the time, on the morning of October the 19th, 1950, when you left around three o'clock in the morning from Eugene Island to Beacon Number Seven to pick up employees, and take them wherever you were supposed to take them, did you have employees of the Magnolia Petroleum Company? A. Yes.

Q. Was there anyone else? A. No, sir.

Q. Except Magnolia Petroleum Company employees, on there that you took back on that occasion? A. No, sir.

Q. Now, where did you take these employees? A. The ones that we picked up Thursday morning?

Q. Yes. A. We took them to our home port there in Morgan City, Louisiana.

Q. No more questions.

Cross Examination

By Mr. Bolton:

Q. Mr. McAllister, while you worked on that crew 82 for Captain Dressel often you kept the log, did you not? A. I did, sir.

Q. Do you remember whether or not you kept the log on Tuesday, October the 18th? A. Yes, sir, I did.

Q. Does the log entry that you made there then correctly reflect what took place at that time? A. Will you say that again?

Q. Are the entries made in the log correct, does the log show what actually happened at the time? A. Yes, sir.

Q. Will you mark this, please? (Page 64 of the Log marked Defendant's Exhibit 1.) Will you examine Defendant's Exhibit No. 1, being Page 64 of the Log thereof of what purports to be the Log of the J. C. Stephens for the—well, for a long period of time, but including the period of October the 18th and 19th and 20th of 1950. A. Alright. (Inspecting the Log.)

Q. Is this the Log of the Stephens? A. Yes, sir.

Q. And this writing following Wednesday, October the 18th, beginning with the entry at 10:30, is that your writing? A. Yes, it is.

Q. And is this your writing on Friday, October 83 the 20th? A. Yes, sir.

Q. Do you know whose writing appears in the Log before Wednesday the 18th? A. Yes, I do.

Q. Whose writing is that? A. That is Mr. George Rosson's writing.

Q. He is on the other crew, is he not? A. Yes, sir.

Q. He is the Captain of the alternate crew on the Stephens? A. Yes, sir.

Q. And you recognize his writing? A. Yes, sir.

Q. Now, I believe you testified earlier that you took the boat out from Morgan City—I will ask you to examine the Log there and see if it doesn't indicate that instead of that, that you relieve the crew at the quarter boat at Lot 9? A. Yes, that's right.

Q. That you leave the crew at the quarter boat? A. Yes.

Q. They were on the Stephens and you came on board the Stephens? A. Yes.

Q. And you boarded it at the quarter boat, is that right? A. Yes.

84 Q. So you did not bring the Stephens out from Morgan City on Wednesday, is that right? A. That's right.

Q. Do you remember how you got out? A. No.

Q. There were other crew boats or tug boats or other methods of transportation that would have taken you out there, is that right? A. Yes, sir.

Q. Now, then, at the time, you came on board the Stephens and was standing by the Q boat, is that right? A. Well, that's an abbreviation for the quarter boat.

Q. Alright, now, the quarter boat was called Magnolia Inn, was it not? A. Yes, sir.

Q. That was an old hull of an old river steamer, wasn't it, that had been converted into quarters and two-seat crew and it has got a half-way point between Morgan City and the Gulf? A. It was old paddle boat that had been converted to a sort of a roominghouse there at the Magnolia Inn.

Q. And you used that as a way-point, halfway station so to speak, between the Gulf, between the rigs and the Gulf and Morgan City, is that right? A. Yes.

85 Q. That was the place where you relieved the crew on the week that you went to work in which you fell? A. Yes, sir.

Q. Now, that Q boat was tied adock, was it not? Wasn't that the way it was moored out there, to a dock? A. Well, in a little slip-like and also tied to the dock.

Q. Alright, and the dock was on the channel side,—the dock that it was tied to was between the channel marked Bouyed Channel, and the boat, wasn't it, or else the boat,

it might be said, riding in the edge of the channel? A. Well, it was behind the dock.

Q. It was behind the dock. In other words, the dock was between the channel and the Q boat, the quarter boat? A. Yes, sir.

Q. Now, when the Stephens docked there, did it dock at the dock, is that where it tied up, to the dock that was in the channel? A. Yes, we tied along side the dock or whatever happened to be there.

Q. Yes, sir. A. Another one of the boats.

Q. You might have some other boat there and if you did, you would tie alongside that boat and cross over into the dock if you wanted to go to the Q boat; is that right?

A. That's right.

86 Q. Now, then, I want you to look here at your log entry on Thursday, October the 19th. First though, tell me where is the last entry which you made on Wednesday, October the 18th. A. Wednesday, October the 18th the last entry of that day was 18:30, arrived at Magnolia Inn, or at Magnolia quarter boat.

Q. Alright, 18:30 to us landlubbers is 6:30 in the evening, is it not? A. Yes, sir.

Q. And that was in October? A. Yes, sir.

Q. About the middle of October? A. Yes, sir.

Q. It would be pretty close to getting dark about time, wouldn't it? A. Well, no, sir, it's not dark at that time, not in October.

Q. Alright, but that's the last entry on the Log and that indicates that that's the last time the boat was used during that day, is that right? A. Yes, sir.

Q. Now, then, the next entry on October the 19th, that's also in your handwriting, isn't it? A. Yes, sir.

Q. And what is that first entry and what time does 87 it show? A. .0400 departed Magnolia Inn.

Q. Now, then, is that the correct time? I believe you testified it was around .0200, or maybe you got under way around 3:30? A. Yes, sir.

Q. Now, this would be the correct time, would it not? A. This would be the time of departure, yes, sir.

Q. Time of departure. Now, then, when you departed, did you have anybody on board other than the crew? A. No, sir.

Q. It would show in the log if there was somebody else on board, wouldn't it? A. Yes, sir.

Q. So only the crew was on board when you departed the Q boat? A. Yes, sir.

Q. And then your next entry is at 0500, is it not? A. 0500, yes, sir.

Q. Read that entry. A. "Arrived barge No. Six at Number Seven Beacon".

Q. Now; that is a point which you have indicated which has been marked here on Plaintiff's Exhibit No. 14, with the X down here, is that right? A. Yes.

Q. And this other X northeast of there, is the approximate location of where the quarter boat was?

A. That would be the lighthouse, yes, sir.

Q. Lighthouse, and the quarter boat was near to the lighthouse? A. Yes, sir.

Q. Now, then, all of that trip which the Log shows, took you an hour, was made in a dug channel around shallow water, wasn't it? A. Well, it is in shallow water. I wouldn't say it was dug.

Q. Well, you are in a marked channel? A. Yes, sir.

Q. You say you don't know whether the channel was dug or not, but it really is a shallow water entry! A. Yes, it is a buoyed channel.

Q. Buoyed channel. And it is deeper in the channel than it is outside the channel? A. Very little.

Q. Your entry there on the—your next entry there is first let me ask you this—when you cast off from the Q boat, from the dock alongside the Q boat, if you were docked immediately or if you were not, is the channel wide enough to make a big wide turn or does the Captain back away and head back down the channel, assuming that he was headed the other direction and wanted to go back out to Beacon No. 7—assuming that he was headed toward Morgan City, that would be away from Beacon No. 7, wouldn't it?

A. Yes.

Q. And that he wants to turn around and go back to Beacon No. 7, how did he do that? A. Well, that would be according to the Captain, however they feel is the safest.

Q. Well, did they ordinarily ~~back~~ and head out or did they take the—it's not a sea boat type of boat, is it? A. No, sir.

Q. It is handled more like a tug or ocean-going craft than a speed boat? A. Yes, sir?

Q. To maneuver it with his engine and ordinarily would back away into the channel and then head back out, wouldn't he? A. Well, if he was headed upstream, as a rule he would go ahead.

Q. Allright. A. And then back away from the—away from his dock.

Q. Yes. He would maneuver his ship away from his dock, and then make— A. Make his turn.

Q. Make his turn. It is not possible with a ship the size of the Stephens to pull out and turn like you do a speed boat, that just zips around the corner!

A. Yes, we had turned that way.

Q. You could do that in this channel? A. Yes, sir.

Q. You can—well, but you don't much think you did that morning, do you? That's not the way you ordinarily did it? A. Well, it's according to which way we were going to go.

Q. Well, we knew we are going to go back out to Beacon No. 7, don't we? A. Yes, sir.

Q. Now, then, how do you make the turn—how do you think the turn would be made? A. Well, you wouldn't back off of there, because there is a shell reef right behind that dock there, or just going out from that Beacon, there is a shell reef there.

Q. Allright. A. He would make his turn to get away, in order for the tide not to catch him and put him in bad shape right there in those reefs—you would pull on up the channel and make his turn and go down.

Q. Well, pulling on up is a matter of a few hundred feet or a few hundred yards or so in order to clear and make his turn. What I am getting at, he wouldn't have had to run up channel any length of distance? A. No, sir, not a long ways.

Q. Now, then, while the ship was lying alongside the Q boat, you all stayd on board, did you not, your quarters were on board? A. On board the—

Q. On board the Stephens. A. Yes, sir.

Q. There are four bunks in that forward hole? A. Yes.

Q. Now, then, while you were aboard there that night, was there any water coming in your quarters? A. Well, I

couldn't say offhand. If it was raining, it would have been.

Q. Did it rain in you crew's quarters space? A. Well, not to say that it would just rain directly in it, but if it rained against the house, it would drip in it.

Q. Yes, sir. The house you are talking about is² the wheelhouse, the deck up there, where the Captain stands, with windows around it? A. Yes.

Q. While we were waiting here, we have brought into the courtroom about a five-foot boat which purports to be a ship model of the J. C^r Stephens. A. Yes.

Q. Now, does that appear to you to be as the 92 Stephens is? A. Yes, sir.

Q. In looking at it as you are now, it appears to be a true likeness of the Stephens, does it not? A. A reasonable enough.

Q. The question that I had asked you before we stopped was whether or not on the night before your run on October the 19th, you remembered whether any water had come into the crew's quarters. A. No, sir; offhand, I couldn't say for sure whether it had or not.

Q. The crew's quarters are located on the deck below the main weather deck of the ship forward of the wheelhouse, or partially forward of the wheelhouse, partially back under the wheelhouse, is that correct? A. Yes, sir.

Q. But on the level below? A. Yes, sir.

Q. Now, the windows which you stated that you thought water would have leaked in around the windows of the house—are these forward windows here those windows? A. Yes, sir.

Q. Now, first, let me ask you whether the Stephens tied alongside of the dock will take water enough over the bow to get water on those windows? A. Now, would you repeat that, please.

Q. I say, when the Stephens is tied alongside a dock as it was from 1830 or 1800 to 0400 on the 19th, will it take water over the bow enough to get water on these windows, a spray on these windows, spray from the sea? A. I have never seen it happen, no, sir.

Q. You have never seen it happen. Well, you wouldn't ordinarily tie your ship up where that could happen, because that would be pretty rough alongside the dock,

would it? A. Well, unless a ship would come past and create a swell that would break against the side of it.

Q. While the ship is not under way and tied up alongside the dock, have you ever seen waves over the bow of the ship enough to get these three windows you have been talking about, these three forward lower windows on the port wide, wet? A. Not to my knowledge, no, sir.

Q. You never have seen that happen while the ship was tied up alongside the dock? A. No, sir.

Q. Now, then, this wheelhouse has an eave, so to speak, out around the forward part, covering and protecting the forward windows or ports, does it not? A. In what sense, you mean it is protecting them?

Q. It overhangs it, it would protect it some from the rain? A. Yes, sir, if it was falling straight down.

Q. Now, then, is it your testimony that rain and rain alone will come through the windows of this wheelhouse in such amounts as to seep down below and get the galley and the crew's quarters wet? A. Not in the galley, no, sir. It will drip down onto the bunks.

Q. That will drip onto the bunk? A. Yes.

Q. From rain alone? A. Yes.

Q. Now, then, to get the galley wet, I presume that it takes some kind of sea water splashing, breaking up ahead, breaking on the windows over enough period of time to get water through there in quantities, water on the deck, water in your station below it and then drip down into the galley, is that right? A. It will if you are washing down.

Q. If you are washing down with a hose on the deck itself inside, is that what you mean? A. Inside of what?

Q. Inside the wheelhouse. A. No, you don't use the hose inside the wheelhouse.

Q. Alright, where are you going to be washing down? Tell about that. A. Well, you wash the whole boat down, from the weatherdeck up.

Q. Alright, with a fresh water hose? A. Yes.

Q. That is when you are back in Morgan City? A. Yes, at the dock.

Q. And that water directed from the hose will get the bunks wet? A. Yes.

Q. Will it get the galley wet? A. Yes, sir.

Q. Alright, now, then, back to our trip on the 19th, we turned the boat around or else I had already turned around

and headed toward the Beacon No. 7 lights, and in the course there, it's always the same, is it not, it has to go the way the channel course goes, isn't that channel course ten degrees true? A: I don't remember here what that course is, sir.

Q. Well, you can look at the chart and see if that is approximately right? A. Yes, it would be pretty close, if it wasn't right.

Q. Allright, you have on occasions conned the ship around it yourself, haven't you? A. Yes, sir.

Q. Do you remember where the wind was from
96 that morning? A. No.

Q. Now, we are starting our trip, two hours later now than you testified earlier because the log shows .0400 instead of .0200, isn't that right? A. .0300, I believe we said, but the log says .0400.

Q. Allright, so the log entry is correct? A. Yes, sir.

Q. You left at 0400 and the log entry says you arrived at Barge No. 6,—I believe you have already testified it might have been Barge No. 4? A. Well, I didn't remember the names nor the number of the barges.

Q. Allright, but the barge you did arrive at is a barge which is mentioned in the Log? A. That's right.

Q. And that is Barge No. 6? A. Yes, sir.

Q. And that was at 0500? A. Yes, sir.

Q. Now, then, I believe you testified that when you got there—did you have to make any unusual number of attempts to land, or were you able to come right alongside and land at the barge? A. Well, I don't remember having any difficulty, no, sir.

Q. Now, then, during the landing, you have left
97 your engineer's station and come ahead to help handle the stern lines, had you not? A. Yes, sir.

Q. Do you remember what side of the Stephens you brought alongside of the barge? A. No, sir, I wouldn't say for sure which side that we brought alongside, but I would think it was the starboard side, if my memory serves me right.

Q. Your best recollection is that it was the starboard side. Now, then, the starboard side of the Stephens is this side over here. It is the righthand side of the boat if you are facing forward? A. Yes, sir.

Q: Now, then, you would have observed the landing because you were out there in time to make it, weren't you? A. No, sir, I don't make no landing.

Q. Well, don't you help out on the lines at the landing?

Q. Well, do you do it after it is immediately alongside? A. Yes, sir.

Q. You secure the Stephens to the barge as soon as it comes alongside and you can, you do that in order to keep it from bumping up— A. Yes.

Q. And besides you want to take your passengers 98 on board? A. Yes, sir.

Q. That's true. Now, then, there are two, or there are two possible landing levels on the barge, alongside of which you could have come? A. Repeat that, please.

Q. Are there two places on the barge that you could land your boat? A. Yes, we could land on either side of the barge or port or starboard.

Q. Is there only one landing on each side of the barge or are there two landings on each side? A. Landings?

Q. Or place to land, place to get out on the barge. A. Well, I guess you could crawl over the bow, if you were a mind to, but we always landed right along side of it, but as far as just being one place to land, we could land from the stern of the barge all the way to where it would rise—the machinery deck, I believe they call it, the forward part—

Q. And the bow? A. Yes, the bow of the boat—it is built, the hull is something similar to that boat.

Q. And it is your best recollection that you don't know, but you think he had the starboard side alongside? A.

A. Yes, sir.

Q. And your log entry shows that fifteen minutes after you made your landing that you left and headed back to Morgan City. Now, that's true, that's the way it was, isn't it? A. Yes, sir.

Q. And I believe you testified that all you did, that you did not get out from the Stephens on the barge yourself during that time? A. No, sir.

Q. Do you know whether Ashton did? A. No, sir.

Q. You don't know whether he did or not? A. I don't know whether he did or not.

Q. Now, his station is up forward? A. Yes, sir.

Q. Handling the line probably ran from this bit or around the bit located somewhere in there, is that right? A. Well, if we landed on the starboard side, he would catch it on that forward quarter cable there.

Q. Right in this location? A. Yes, sir, either there where that winch line up at the front there—

Q. This is the winch line here. A. I can't see what you are pointing at.

Q. There is a winch line on the Stephens that is 100' further up on the bow than any of the machinery?

A. Yes, sir.

Q. And he would have caught his line—the line would have been permanently attached to the barge and secured from the barge to the Stephens. You didn't cast your line over, or did you? Where did the line come from? A. We used our own lines.

Q. You used your own line and you cast it to the barge rather than the barge casting the line to you? A. Yes.

Q. And during that operation you stood on the—I believe you call this the well-deck, and with the rope or line and cast it to the bargehand, is that right? A. A deckhand on the barge.

Q. And you made that secure, didn't you? Were you up here at approximately this place? A. Yes, sir.

Q. Up here where these bits and what's the other thing called? A. And the cable.

Q. The cable and bits are located, but on the starboard side over here, your line was fixed to that at the time you cast it over, is that right? A. As near as I can remember, yes, sir.

Q. Alright. Now, then, that did put you out exposed to whatever weather there was, didn't it? A. Yes, sir.

Q. You were under this canopy; the canopy is there—that's the way the boat appears and the way you kept it? A. Yes.

Q. The rain would get on you there? A. If it was raining, yes, sir.

Q. If it was raining, I will ask you whether or not it was raining. A. As I say, I don't remember the exact weather condition.

Q. Well, now, I will ask you whether or not, you told me when I took your deposition about a year and a half

ago, that on that occasion it was raining. A. Raining when we tied up?

Q. Yes. A. It could have been raining, yes, sir.

Q. Whatever you testified to then, is correct, is that right? A. I would say so, yes, sir.

Q. But you say now you are not sure; is that right? A. Yes, sir, that's right.

Q. Alright. Now, then, if the boat had just been on its way for an hour on its way out, and any kind of spray at all from the wind, if you were going downwind, and you had any kind of a bow spray, did you kick up much 102 with your twin screws back there? A. Downwind.

Q. Going downwind, yes, the water following you? A. No, sir.

Q. Well, did the spray ever get on this weatherdeck here? A. Yes, sir, when it seeps, yes, sir, it does.

Q. Well, does it get on there when you are in the channel, like you made this run this night? A. Yes, sir.

Q. So the deck was probably wet, do you remember whether it was wet or not? A. I couldn't say, no, sir, and be positive. I couldn't say that it absolutely was wet.

Q. You don't remember whether it was wet or not wet? A. No. It would be wet if we went down a channel whether it was raining or not.

Q. Well, if it had been raining, it would be wet for sure, wouldn't it? A. Yes, sir.

Q. Now, then, when you left the—after you had cast your line off and started back into Morgan City, and you started down to your station on the trip that you made there, and right there when you fell, you went through these doors, two doors here, did you not? A. Yes, sir.

103 Q. Now, there is a high combing there, is there not? A. Yes, sir.

Q. A matter of two or three feet that you have to step over? A. About two or two and a half feet, yes, sir.

Q. Would that be about as long as this? (Indicating) A. Yes, sir, that would be pretty close to the height.

Q. I have in my hand, speaking about—at a point about three inches long, is that the way you would say? A. Yes.

Q. Now, that combing—it is a water-tight seal across there to keep the water out of the well-deck from the lounge, does it not? A. It's water-tight in what respect?

Q. Well, will water from the well-deck flow onto the lounge, the deck, the lounge on the main deck? A. Not from the deck itself, no sir.

Q. I believe you said it would not. What was your answer? I am sorry. A. The deck itself—on the deck there is a water-tight bulkhead.

Q. Now, you came through those doors, did you not? A. Yes, sir.

Q. Now, then, do you remember whether they 104 were opened or closed? A. No, sir, well, in rough weather, we keep them closed.

Q. You just say what you did do. You don't have any independent recollection of this time? A. No, sir, not of them being opened or closed.

Q. Mr. McAllister, I have removed from the model, the super structure, is that not right? A. Yes, sir.

Q. Including the entire wheelhouse, deck and wheelhouse—and the wheelhouse super structure? A. Yes.

Q. I wish you would look at this to satisfy yourself that these things are about like they ought to be. Can you see well enough to do that, or do you want to come down here and look? A. You mean in respect to this?

Q. With respect to the location of the stairs, and the fact of there being a rubber matting around the middle lounge? A. Yes.

Q. And with respect to there being two doors which opened in this manner, one door opening to a ladder which goes up into the wheelhouse, and the door on the porch-side opening into a ladder that goes down into the lounge?

Q. I was going to ask you that next. Now, this 105 bulkhead which is the first end board forward of the boat. That bulkhead continued on to meet this cowling here, does it not? A. Yes, sir.

Q. There is no communication between the two spaces through which the ladder is run? A. No.

Q. A solid bulkhead. This should have gone clear out to the door here to the cowling there. Now, in those respects and particularly with reference to the location of the ladder and of the hand-rail and the grab-rail, does that truly represent that position there within reasonable limits? A. Yes, sir, you can sure tell what it is by looking at it.

Q. Now, Mr. McAllister, where was this mat that you wiped your feet on, that you told Mr. Mandell about as you came in? A. We kept a mat here right as you come in from this.

Q. The point here that you mentioned there is just over the combing as you walk forward from the well deck? A. Yes, sir.

Q. Just as you step in the lounge? A. Yes, sir.

Q. Now, is that the place where you had a mat on that occasion? A. Yes, they kept one there at all times.

106 Q. And you wiped your feet on that mat? A. Yes, sir, I always did.

Q. Do you remember doing it on that occasion? A. Yes, I always did.

Q. I know you said you always do, but do you remember doing it on this time, or do you just say that because you remember that you always did and meant to always do it? A. Well, I will say that I did, because I know I wiped my feet before I go in the boat at any time on the weather-deck.

Q. But you don't remember this particular time independent from other times, that you actually wiped your feet; do you? You mean that you just know you did because you always did? A. Yes, sir.

Q. But you don't remember anything that occurred while you were wiping your feet this time that made you remember this? A. No, not as making it any different from any other time.

Q. Now, then, was there any other mat in your lounge there? A. Yes, sir, there is this back area here on the deck of the boat. There is a rubber—that is this area, about here to here—it's a raised rubber matting like you see in barber shops and other places.

Q. Yes. A. You can roll it up to take it out and clean it.

107 Q. Now, the lounge chairs—those are the reclining aircraft-type lounge chair? A. Yes.

Q. And those are called—this area from aft of the doors that we talked about, or hatches on the port side— A. Leading to the galley.

Q. Leading to the galley clear aft to the cowling, is what you call the lounge? A. Yes, the passengers lounge.

Q. That's the passengers lounge? A. Yes, sir.

Q. Now, the space—the passengers lounge is entirely enclosed with a cabin? A. Yes, sir.

Q. Consisting of windows and sides? A. Yes, sir.

Q. Such as we removed from this model here a few moments ago? A. Yes, sir.

Q. Now, then, as you go on your trip down, on this trip that you made on that date, the combing between the stair landing or the deck forward or the deck aft, aft of the door here,—there is a combing there, is there not? A. At the door, yes.

Q. At the door. And the door, a part of the door fits into it? A. Yes, sir.

(Recess until Tuesday, March 8th, 1955)

237 RICHARD A. McALLISTER, the plaintiff, being recalled to the stand, testified as follows:

Cross Examination

By Mr. Bolton:

Q. Mr. McAllister, at the time you were on the stand yesterday, I believe we had been following your progress on the occasion of October the 19th at about five o'clock, shortly after five or five-fifteen a.m., after you had cast off the stern line, you testified you stepped over the combing and wiped your feet and walked down the rubber mat and then you turned slightly to your left to approach the entrance to the stairs leading into the galley? A. That's right.

Q. That is at the point we were, I believe, is that right? A. Yes, sir, I believe so.

Q. Now, then, I believe you further testified that in this particular area the model did not correctly depict to the ship in that this bulkhead was run longitudinally along the fore and aft of the ship, extends all the way into and is a part of the door section so that there is no communication between the space occupied by the ladder leading downward from the wheelhouse to the lounge deck and the space occupied by the landing and by the ladder leading downward from the lounge into the galley,

238

is, that right? Just exactly what do you mean by no communication between them? A. Well, the bulkhead comes all the way into the door span.

Q. That's right. You can't go in between it, you have to go out and around? A. Yes, one door and then into the next one.

Q. Alright. Now, then, Mr. McAllister, as you started down the ladder, tell me exactly as well as you can, just how you stepped? A. Well, sir, as I remember it, this little approach there or vestibule I guess you would call it, is a landing above that ladder there. Well, as I just walked through—

Q. That is the level of the deck itself—you had stepped over the three inch or four inch combing and had gotten on the deck again, the same level as the deck you had just stepped over, is that correct? A. Yes, sir.

Q. And the combing there is a part of the door fitting, is that correct? A. Yes, sir.

Q. And that landing is wide enough, easily wide enough to stand upon, isn't it? A. Yes, sir.

Q. With both feet? A. Yes.

Q. There is no question about it! A. It is as wide as the ladder, yes, sir.

Q. Well, if it is as wide as the ladder—but how deep is it from the door combing forward? It is two or three feet, maybe four feet there, isn't it, a little landing? A. Well, I would say it was two and a half feet.

Q. There was no problem about getting both feet firmly fixed on that landing? A. No, sir.

Q. Alright; now, then, from there, what did you do? Do you know whether or not you had both feet down flat or were you continuing to walk as you started into the ladder, did you hesitate in any way? I will just ask it that way. A. No, sir, as I walked through, I just took hold of the handrail and made my step to the ladder.

Q. Now, we will stop just a second. At that point, you were not carrying anything at all, were you? A. No, sir, I didn't have anything in my hand.

Q. Nothing in your hand? A. No, sir.

Q. Then was there any emergency or anything of that kind that was causing you to hurry? A. No, sir, I wasn't hurrying..

Q. You were going back at your normal rate of movement? A. Yes.

Q. Without having an emergency? A. Yes.

Q. Allright, now, then, the ladder itself—and I will show you what I would like for the Court Reporter to mark as an exhibit. This is a pine board on which has been mounted a step and what appears to be a portion of a step. Now, then, I will tell you that we will connect up and prove that that approximately twenty-one inch section of step there is a step which was at the time of your fall, the top step of a ladder leading from the lounge into the gallery. Now, does that look to you to be that step? A. Yes, sir, it is similar to it. It looks like it might be it.

Q. I notice these little splashes of paint there. The ladders on the Steps were painted yellow, were they not? A. No, sir, not at the time of my fall, they were not.

Q. Well, have they been since painted yellow, or do you know? A. I don't know about how the yellow got there. They weren't yellow at the time I was a member of the crew on the boat.

241 Q. Now, then, allright. That of course doesn't enter into our problem. Now, then, this step is made, is it not, of metal—with a black strip of some kind, an abrasive strip between the strips of metal which ran longitudinally along the length of the strip? A. Yes, it appears to be aluminum.

Q. The metal appears to be aluminum with sort of a—how would you describe it? Would you say that it is an abrasive substance such as you might find in an abrasive grinding wheel, something of that kind? A. It is a rough substance, yes, sir. I wouldn't say what it is.

Q. Allright, I will say further that the evidence will later show that this step was removed from the Stephens on or about—and I think it's on, the 29th day of November, 1954. Now, that was approximately—it was a little over four years after the date at which you say you fell, is that not right? A. Well, this is not all of this step.

Q. Well, this is the tread of the step, is it not? A. Yes, sir. There is a metal piece that should be out forward of that.

Q. Well, this is the entire tread of the step. A. There was a piece like this mounted on the step, yes, sir.

Q. Alright, but this is the tread. In other words,
242 that's the part that your foot is on? A. No, sir, not
necessarily.

Q. Well, it is the part that lies flat on the step, is it
not, and the only part that lies flat on the step? A. Yes, sir,
that is mounted on the step.

Q. Isn't that called—we may not be talking about the
same thing—I don't believe we are talking about the same
thing. I am not much of a carpenter, but I believe the step
has a riser and it has a step, in common usage. Haven't
you heard it spoken of that way? Now, the part that you
are talking about is the portion of the riser or is a portion
of the support for this, is that right? A. Well, I guess you
would say that it would be the support for this.

Q. The support for that? A. Yes, sir.

Q. Alright, so this is the portion—this, the step of
a step is the part on which you put your foot and this is
the step of that part of the ladder, is it not, that's the
surface that was exposed for use in going up and down
at that particular level, the top level? A. This and the
other part that extends past it.

Q. I will ask you to look at Plaintiff's Exhibit No. 8.
I've got it in my hand here. It has been introduced in
evidence, and if this is the step which was taken
243 from the Stephens and which was there on that date
in that picture, it would have been right here,
wouldn't it? A. Yes.

Q. Now, this picture was taken since November, so it is
not a picture of this step. You were down there last week
when this picture was taken? A. Yes, sir.

Q. And if this were removed in November, why this
wasn't there, but this picture depicts where this particular
piece of metal came from? A. Yes, sir.

Q. That's right? A. Yes, sir.

Q. Now, do I understand your testimony now, yesterday
and by deposition to be that your foot slipped on the step,
the top step? A. As I stepped, yes, sir, my foot went out
from under me.

Q. That's the top one? A. Yes.

Q. It was not the deck, but was the step. It was not
the deck that you stepped from that you slipped on, but
the slip occurred when your foot was being placed on this
step? A. On the step, yes.

Q. Now, then,—now, that step is six inches wide—
244 that looks about six inches to you, doesn't it? A. Yes, sir.

Q. And your foot is longer than six inches, isn't it? A. Yes, sir.

Q. Now, then, when you go up a step and go up this particular flight of steps, you cannot get your entire foot or shoe on that if you face it completely forward, can you, I mean if you don't turn your foot, is it possible for you to get your shoe entirely upon a tread this wide, even when you are facing the ladder going up? A. Unless you went down sideways, no, sir.

Q. Alright, that's what I meant unless you went down sideways. But facing it forward, and putting your foot straight through, your shoe will not entirely fit upon the step? A. No.

Q. Your shoe is too long, is that correct? A. Yes, sir.

Q. But in going up that step in that manner,—in going up the step, if you put your foot clear through, I've got here now Plaintiff's Exhibit No. 11, that is one of the pictures that were taken down there last week or so when you were there at the time? A. Yes.

Q. I call your attention to the fact that—inde-
245 dently, are these steps of the same width all the way up, as far as you know? A. To my knowledge, yes, sir.

Q. As far as you know, they are the same width from the bottom step clear to the top, and this being the top step? A. Yes.

Q. Now, after you get above the second step, as you see it in that picture, at this point where my pencil is on the endboard side of the ladder, there appears to be a vertical plate, is that right? It's vertical, it goes up and down, and it is this plate right here that I am talking about, at this point right here. A. Now, are you talking about this piece right here?

Q. No, I am talking about the piece which is in back of the tread. A. Part of the bulkhead, yes, sir.

Q. Part of the bulkhead? A. Yes, sir.

Q. And that part is vertical? A. Yes, sir.

Q. Straight up and down from the deck? A. Yes, sir.

Q. Now, then, from that point forward, upward rather,

not forward, from that part up the ladder, there is a plate likewise a metal plate of some kind back of it, is 246 there? A. Yes.

Q. This area right here? A. And this area here as far as we can see in this particular picture? A. Yes, sir.

Q. Now, then, that plate is at an angle, is it not? A. The same angle as the step.

Q. The same angle as the back of the step? A. Yes, sir.

Q. Now, then, in going up the ladder and facing forward, and not as you suggest putting your foot at an angle, you are able to put the toe and ball of your foot and that portion of your shoe that covers the toe and ball of your foot on the step clear back up until it hits whatever is in back of there, this metal plate, isn't that right? A. Well, now, maybe I am thinking different than you, but when you turn if facing forward, are you facing forward of the boat or you facing forward of what?

Q. I mean to be facing the ladder itself. A. Yes, sir, facing the ladder.

Q. Now, then, in that position and in making that climb at that time, you can get your foot as far through as this back. Now, you are looking at the front edge of the steps and this would be the back edge of the step? A. Yes.

247 Q. This would be the part that would be against the back? A. Yes.

Q. And so as you put your foot on there, you can get through a full width of the step until your toe or the leather around your toe of your shoe strikes whatever backing there is? A. Yes.

Q. Either the vertical one or the one that slants backwards at the same angle as the step? A. Yes.

Q. Now, in that position, and going forward on the ladder, I mean facing the ladder, going up on the ladder, you get the maximum amount, the most amount of your shoe that you can get in going up the ladder without turning your shoe one way or the other, isn't that right? A. You mean you can put your shoe on the ladder going up?

Q. I mean, you put your shoe on the ladder, but I say you can put more of your shoe on the ladder going up— A. Than what?

Q. Than in any other position. A. Well, no, sir, I wouldn't say you could.

Q. Except by turning your shoe? A. Well, you could put the same distance if you had your shoe in the opposite direction as you could in the forward direction.

248 Q. You mean "put" your heel at the back of the step each time? A. Yes, sir.

Q. But you don't walk down steps heel first, do you, when you go down the steps you reach over with your toe and reach the step ahead rather than walk down on your heels, isn't that right? A. According to the way the step is built, sir.

Q. I mean on any step. It is just the way you are built. It's not any habit or anything, when you step down, you reach out—your toe is what you are lowering, you can't lower your heel any, can you? A. You mean extended past the end of your foot, no, sir.

Q. You can't lower your heel any more than your foot, but you can lower your toe down there just a little bit? A. Lower than your heel, yes, sir.

Q. Lower than your heel, and when you go down steps, the ordinary type of steps, any time—let's forget about this time for a minute, but your ordinary way when you are going down steps is to reach down with your toe forward and the first contact you make in going down is with the forward part of your foot, the ball or toe of your foot, isn't that right? A. Well, I don't know. It looks to me

like your foot would hit, not necessarily to any—if 249 you are going down the steps, why should your toe hit first any more than the rest of your foot?

Q. Because your toe is out in front of your heel. It is further extended, it will reach out further than your heel, it will reach down further. You can put your toe down further than you can put your heel. A. Well, if you are walking down steps, you don't go just touching your toes along.

Q. No, I don't mean to say that. But I am talking about the first part of your foot that touches the step when you go down, is your toe or the ball of your foot, isn't that right? A. Well, I don't know that that would be right, no, sir.

Q. Alright, well, back then—we are going to talk about these steps on the Stephens, and we are talking about a man being down in the galley and starting up. Now, then,

he doesn't put his heel on the step first there, certainly, does he? A. Not if he is going up, no, sir.

Q. He puts his toe end, doesn't he? Reaches for it with his toes? A. Yes, sir.

Q. And he takes his balance, takes his weight on that foot and he brings it down to balance and at that point, however long his foot is and however far he has got it in here, he catches and balances his weight on that foot, and then he takes another step forward and does the same thing with his other foot, doesn't he? A. Give me that question again. I don't think I understand you, I don't understand what you are talking about.

Q. Well, I certainly want you to understand. I don't want to mislead you. I want us to understand each other. What I am asking you is, that when a man ascends the steps, goes up the steps and he is facing the way he is going, facing after the handrail is on his right hand? A. Yes, sir.

Q. Alright, he first steps up—now he doesn't step up with his heel, does he? He steps up with his toe? A. On this particular step you couldn't put your heel on it, no, sir.

Q. Alright, you step up with your toe, and you put your foot through either all the way or you put it through enough to get a grip with your foot? A. Yes.

Q. Or you may not put it all the way through, but you put it through far enough to where you have got a grip with your foot on the step? A. Yes, sir, enough to stand on.

Q. And at that point then, you lower your weight on that foot just a little bit and bring it back down, don't you, in order to get balance to make the next step? A. Yes, sir.

Q. And you do the next step the same way, you put your other foot up. That is the way, you normally go up any flight of stairs and particularly this flight, because you can't put your heel on it? A. Yes, it has got a back to it, yes, sir.

Q. Now, then, if you put as much foot as you can through in going up, you have got your front of your steps and you have got your foot over here as far as it will go, and that's as much shoe leather, that's as much surface as you can get on that step, isn't it? A. Yes, sir.

Q. Now,—now, then, we are talking about getting most of your foot on it. The steps are wide enough, they are wider than most people's feet are wide, aren't they, this way? If I put my foot or you put your foot and toe this way and your heel this way and— A. Longitudinally, yes..

Q. Longitudinally. You would be able to put your entire shoe on the step? A. Yes, sir.

Q. Now, then, there isn't anything in the construction of the step there that prevents you from doing that if you wanted to; if that was just the way you chose to go; 252 you could put your entire foot on it longitudinally as I have the pencil there, could you not? A. Possibly the first step on that particular ladder, yes, sir.

Q. You mean possibly you could not? A. You could on the first step, the top step.

Q. On the top step, you could put your foot there. Now, then, what happens to you on the next step, that is the reason you can't? A. The next step overlaps the one below it. The top step overlaps the step below it in looking down on top of it.

Q. You mean—I want to be sure I understand what you mean. This being the front of the step going down, this is the back, that this overhangs the step below? A. Well, they are pretty close, yes, sir. Well, no, I wouldn't say it would overlap it.

Q. It doesn't overlap it. It is directly beneath it, isn't it, the whole step? A. Well, I would have to look at it.

Q. Alright. In other words, you are just not sure and you don't want to be misunderstood about it? A. Yes, sir.

Q. Alright. Now, then, I am asking you if you want to go down—I am not asking you if you went down it backwards or if anybody went down it backwards—but 253 there is nothing physically to prevent, nothing in your way, to prevent a man from coming up to that step if he wants to, putting his two feet on it; facing forward, holding on to the handrail and backing down the steps, is there? There is nothing in the way to keep you from doing it that way if you want to do it that way? A. Now, facing forward again?

The Court: He means facing the ladder.

Q. Mr. Bolton: Facing the ladder, you would be facing aft, but you would be traveling forward, you would be backing forward facing aft? A. Yes, you can turn around if you want to.

Q. You can turn around if you want to. There is nothing at all in your way physically to prevent you from doing that? A. No, sir.

Q. And if you did that, you would have a good firm grip on the handrail all the time? A. You could switch hands, yes, sir.

Q. That way, well, you could use your right hand backing down it, wouldn't you, if you are facing the lounge backing down the ladder, you would be using your right hand? A. Yes, sir, if you were backing down it, you would, yes, sir.

Q. Or if you are going up it and holding on you would use your right hand? A. Yes, sir.

254 Q. You would be in the same position as if you were climbing it, except you would be traveling in the other way? A. In the opposite direction.

Q. Now, if you went down that way, you would be able to get as much of your foot on each of these steps as you could have gotten, or do get, when you climb the ladder that way, isn't that right? A. Yes, sir, I would think so.

Q. Now, then, the truth of it is, on this top step, isn't it, that you quite often turn your foot a little bit to get more of it on the top step, so you can have a safer way to go down, even if you are going to go down facing forward, facing the galley, you still turn your foot to get more foot on the step? That's quite often done, isn't it? A. Well, I couldn't say right offhand whether it is or not. I couldn't say whether I turned my foot sideways or not. I just don't remember.

Q. Well, I haven't asked you about you. I don't mean you particularly, but do you know whether anybody else does it, what you are doing is trying to get that much 255 of your foot on that step as you can. You want as much surface, you want as much security, you want as much footing as you can get, don't you, in going up and down the ladder? A. Yes, sir.

Q. That's what you are trying to do. Now, you can't put your whole foot there, your heel can't come back like

mine is, because of this backing here. Now, this top step, and I am talking about the very top one, it has a little vertical piece behind it or a joint connecting it with the deck level, doesn't it, backing it up just like this bulkhead down below? A. As I remember, there is about an inch there.

Q. Alright, just some slight height, whatever the height of the deck is above the top step? A. Yes, sir.

Q. And that is a solid piece of metal plate of some kind that comes down. Now, that sets like my tablet here, parallel with the same plane as the step and the deck here, is that right? A. Yes, sir.

Q. And then some distance here, you say about an inch. I think you would find it to be as much as maybe three inches, and between the deck and this top step—now, that's the way it is, isn't it? A. Yes, sir.

256 Q. That's pretty well the way it shows here, isn't it? It shows in here, doesn't it, it shows you that little bit of part step at the top here, right here. I have my pencil, can you see it? A. No, sir, I can't see it.

Q. Would you step over here? A. Yes, sir.

Q. I have my pencil on the top step of the ladder. That's it right here, isn't it? A. Yes, sir.

Q. And then there is a little distance between that step and the deck above? A. Yes, sir, there is some distance. Just what it is, I wouldn't say.

Q. Alright. But there is backing there, just like there is behind all these others here? A. Yes.

Q. Alright, now, then, Mr. McAllister, up here on this step when you step on it, because of that in back of it, you can't put your heel just straight down, you have got to step up over that to put your foot down, don't you? A. You don't step up over it. You are already on it, on that step. You just step off of it.

Q. You step off of it, but you have got to carry your heel forward far enough before you put it down?

257 A. Yes, sir.

Q. To miss the deck level behind you? A. Yes, sir.

Q. Now, then, when you do that, you don't have very much shoe on that step, do you? A. As much as you would have in the opposite direction.

Q. Well, in the opposite direction you would have it all the way through and that's the way you are going to miss yourself on that way, and if you turn back the other way, you have got your heel there, haven't you? You can turn your foot slightly and improve your position, can't you? A. Yes, sir.

Q. If you turn your foot just a little bit, you get a lot more surface, don't you? A. Yes.

Q. And that can very easily be done, I mean there is nothing in the way, you can put your leading foot whether it be your left or your right, by turning it just a little bit on that top step, you get a lot more shoe on the step, don't you? A. Yes, sir.

Q. Now, then, I want to ask you if you are standing on the vestibule preparing to go down the step, you can either step off with your left foot or your right foot—now, then, you can step off with your left foot and turn slightly—you have turned your back to the handrail, haven't you? A. Yes, sir.

Q. And it would be more difficult for you to reach it and hold on to it than if you step off with your right foot and turn it slightly; then you are facing the rail, and you can reach it with which ever hand you want to. Ordinarily going down, what hand would you use? A. I would use my left hand.

Q. You would use your left hand. Now, then, facing forward and turning your foot slightly you are able to get more shoe on the step and you are closer with where you are going with that left hand, to the handrail, and you always made a practice of using that rail going up and down that ladder, didn't you? A. Yes, sir, and the bulkhead on the other side of the ladder.

Q. In fact—that particular stairs, you feel like you want to use that handrail, don't you? A. Yes, sir.

Q. It is not like a big broad stairway in a department store with a highly polished rail on the inside that you kind of hesitate to put your hand on it because you will mess up the brass. This is one that you would like to use, isn't that correct? A. It is there for that purpose.

Q. And you use it for that purpose, don't you? A. Yes, sir, I do.

Q. And it is a firmly fixed rail? A. Yes.

Q. There is no flexibility in it? A. No.

Q. It is welded to the side of the ship in two points, top and bottom, isn't it? A. I believe you will find that it is put on there with screws.

Q. Well, at any rate, it is firmly fixed in there, isn't it? A. Yes.

Q. There is not any movement in it, is there? A. No, sir.

Q. Alright, and it is big enough around to give you a good hand grip on it? A. Yes.

Q. Now, then, after we have talked about that, can you tell me how you went down that day? A. Well, I didn't come down that day.

Q. I don't mean to try to trip you, but how did 260 you start down? Here is a step. A. I would have stepped with my right foot.

Q. You would step with your right foot onto this top step? A. Yes, sir.

Q. And do you think you would have turned it possibly? A. Possibly so, yes, sir.

Q. And that would have put you in position to easily reach over to the handrail? A. Yes, sir.

Q. And you did have your handrail, did you not? A. Yes, sir.

Q. Now, then, you are pretty sure that you didn't step with your left foot, because you can't very well grab that rail backward? It would be very awkward? A. It would be very awkward; yes, sir.

Q. Now, then, you stepped down—at that time you had no trouble at all with your back or joints? A. No, sir.

Q. And you walked just like anybody else walked, so if you step out there with your foot and you have got the leather, the sole of your foot as much as you can, on that step, before you start down, is that right? A. Yes, if you turn it that way, yes.

Q. And you think probably you did turn it? A. Well, the reason, now, that I say that I possibly did, 261 is on account of this bulkhead by the side, as I would go down.

Q. Which bulkhead? A. The end board bulkhead. The end board bulkhead, that would be this one over here opposite the railing.

Q. Yes. A. At times, working in there, I would get—I wasn't exactly clean, I would get the bulkhead dirty, I

would generally hold on with this hand and drag this hand down the bulkhead as I would go down. My elbow and sleeve—you sort of brace yourself as you walk down.

Q. So you think probably that that makes you think that you stepped down with your foot turned just a little bit to get more surface? A. Yes, sir.

Q. And to hold on and maybe you had your elbow back or maybe you didn't, up against the other bulkhead, but the other bulkhead is just as far from you as, I mean the entire passageway is the width of this step at that point?

A. Yes.

Q. Plus just a little overhang on the outboard side? A. On the outboard side, yes, sir.

Q. But the inboard side is straight up against the bulkhead? A. Yes, sir.

Q. And so far as the outboard side is concerned on 262 that step down there, there was a solid piece of metal at the end of the steps too? A. Yes, sir.

Q. Alright. Now, then, so you probably put your right foot—you are pretty sure it was your right foot—you stepped over—you had hold of the railing and you put your foot forward and reached with your toe like you do, that is the way you ordinarily go up and down, and then you came down to rest, or stated to, when this thing happened to you? A. Yes, sir; I slipped off of that top step.

Q. You slipped off of the top step.

(Defendant's Exhibit 3 marked)

Q. Now, I have here a one cup measure of water and a sponge. I will put this step up for you and I will ask you if you will, please, to put as much water as necessary—to put as much water back on the step as you saw there that day. Can you do that? A. Well, I don't remember just how much water was on that.

Q. Well, I understand you don't, but you know how it looked, don't you? You saw it, you looked at it? A. Yes, sir.

Q. Well, see if you can put water on there, as much water as would make it look the same way. I would rather you 263 you would use the sponge to clean that, if you will, because I want to measure out of the cup what you have used. I mean, I would like for you to keep yourself clean and clean the step up, if you want to, but I

would prefer for you to pour from the cup. A. You mean out of here on there?

Q. Yes. A. Alright. As I remember it, that is about the situation it was in.

Q. Alright, now, then, I believe you testified that after you fell, you remained—you were stunned so to speak for a moment or two. You got up, you were helped or managed to get into a chair or a bench down there below,—now, then, how long about did you remain there before you got up and examined the step? A. Oh, it was a few minutes.

Q. Well, would you guess it was two or three or something of that nature? A. Well, I would say four or five minutes.

Q. Four or five minutes that you sat there? A. Then I got up, straightened myself up.

Q. And then had anybody been up and down the steps besides you during that interval of time? A. Yes, sir. Shorty came down.

Q. Now, that Shorty, that's Ashton? A. Yes, Mr. Ashton.

264. Q. He came down the steps right behind you, didn't he? A. Yes, sir.

Q. Was there anybody else that come down the steps in that interval of time, between the time you fell and the time you got up and looked? A. Offhand, sir, I couldn't say.

Q. You don't know of anybody, at this time, you don't remember anybody? A. I wouldn't say definitely that they did or they didn't, no, sir.

Q. Now, Mr. McAllister, have you still got about as much water as you want? Do you think it is about as dry, dry enough now? A. Well, no, it's about right.

Q. About the same amount of water now? A. Yes.

Q. Alright, now, then, would you step down here carefully so we don't have another fall and make a mark as well as you can with your foot there that you saw on that occasion when you got up and examined it. A. I don't think what is on there would make a mark, but I will try it. It showed a smear about like that.

Q. It showed a smear about like that? A. Yes.

Q. That smear was the one you saw about four or 265 five minutes after you fell, is that right? It looked

like you had a good deal of dirt on your shoe there this time. A. Yes, sir.

Q. Did you have that much then? You said you had washed your shoe before you came in, that you didn't have that much dirt on them? A. No, sir, I didn't have—I wouldn't say I had any dirt on my shoe.

Q. Was this part along like that? Run your hand over it there, if you don't mind. Now, then, is that a different feel from the feel you got there that day? Is that that oily? A. No, sir, it don't appear to be oily at all.

Q. That appears not to have any oil or film on it? A. Yes, sir.

Q. You mean it does not appear— A. It has no oil on it.

Q. It has no oil on it? A. No.

Q. Now, then, this oil film which you did see there, was there as much of it as you saw there, I mean was it as black as that mark made there with dirt with your shoe? A. Yes, sir, I would say it was that black or maybe blacker. I don't remember exactly.

Q. I believe—you remember the occasion, I am 266 sure, in Houston, Texas on the 29th day of December, 1953, that Mr. Mandell and you and I and the Court Reporter and maybe one other lawyer took your deposition? A. Yes, sir, I do.

Q. Now, then, that was taken and at that time you were sworn just like you have been sworn here today? A. Yes, sir.

Q. Now, I believe you said there, and here is the question on page 50 line 21, and following—the question was by me and I asked—quote—"I mean what caused your foot to slip?"—Answer—You gave this answer—It was wet from water and stuff coming in. —Question—Did you examine the step to see that at that time?—Answer—Yes, Ashton and I looked at it. It was oily.—Question—It was oily?—Answer—It wouldn't have been so bad, but it had oil and water on it and oil and water get pretty slick."—Now, that was your testimony there then? A. Yes.

Q. And that's the way it is today? A. Yes, sir.

Q. Now, then, that inspection that you just testified about, that you and Mr. Ashton made, was the one that you made about four or five minutes later, as you 267 have and as you have described it? A. Yes, sir.

Q. Now, then, on page 51, beginning at line 21--the question was—"Describe the oil that you found there? What kind of oil was it?"—Answer—Well, if wasn't oil like it would just be flowing off of it, but you could wipe your hand on it and you could get oil. It wasn't like you'd just poured oil on it."—Now, that is the questions and answers you gave on that occasion? A. Yes, sir.

Q. And that is the way it was? A. Yes, sir.

Q. Alright, the next question was—"Well, was it machine oil or crude oil or what kind of oil, if you know?"—Answer—Well, it was just black.—Question—And that's your answer?—Answer Yes.—Question—Was it a black, sticky kind of oil, kind of like crude oil?—Answer—Well, yes, more like you use loose oil or burned crude oil."—Is that the way you described it? A. Yes.

Q. Is that the way you remember it now and remembered it then? A. Yes, sir.

268 Q. (Reading) —"Was that oil on more than one step?"—Answer—As near as I know, we didn't look at but the top one, as near as I can remember."—Now, is that what you did there, you only examined the one step on that occasion? A. Yes, sir.

Q. I believe you said you had to feel it across the step in order to know that it was there? A. Yes, sir, well, in order to find out what was making it slick, I just involuntarily like you would wet paint, I guess, I just run my hand across it.

Q. Well, after you had run your hand across it, were you able to tell it was there from what was on your hand or from what you saw on the step? A. Well, I could feel it on my hands and I could feel it on my hand.

Q. But you couldn't tell any difference on the step, or could you, when you had just run your hand across it? You just ran your hand along the step longwise, is that what you did? A. Yes, sir.

Q. Alright. A. I just slid my fingers across it to see what would come off.

269 Q. Then you looked at your fingers? A. Yes.

Q. Like I can look at mine now and see dirt on them? A. Yes.

Q. That was the way that you knew oil was there, by what was on your fingers? A. Yes.

Q. Not what you could see on the steps? A. Yes, that's right.

Q. You couldn't see any oil on the steps before you felt for it, could you? A. Could I just look at it and say, "That's oil on there?"

Q. No, sir, could you look at it and see any substance that you were feeling for there? A. I could look at it and see the smear that my foot had made on it where I figured that I had slipped off of it.

Q. Alright, and you saw something raised there, such as you demonstrated here a minute ago with dirt on your feet, and it left a black gathering in the water, is that right? A. It was—well, how could I explain it. When my foot slipped off of it, you could see that it left some—it was different from the rest of the step, I will say that. It was like if there had been something here and where my foot slipped off of it you could see it, if it was—it had pushed it off of it.

Q. You are taking,—I think I understand you.
270 You are talking about the sear mark or the scuff mark— A. That my foot left on there.

Q. In the water that you say you saw after you got back up and came back and looked at it? A. Yes.

Q. And that was the point, except for that point right there, the step looks like it always did, except it had water on it, is that right? A. Water and whatever—I said oil—when I passed my hand on it, it came off black and it felt like it was oil on my fingers.

Q. Now, you were able to get that by rubbing across the step? A. Yes.

Q. And you could not see it, standing above it before you got ready to step? I mean, you couldn't see it unless you got down and felt for it, if it was there, unless you looked at it on your hand? Looking at the step before you stepped, you couldn't see any oil, is that right? A. I didn't say that, no, sir.

Q. Well, is that right? Could you see the oil? There wasn't any scuff mark on it before you stepped, was there? A. No, sir, I didn't just especially inspect the step before I stepped on it.

Q. Well, let's get at it this way. There wasn't any
271 particular spot on the step different from any other spot except that spot that had been made by your

foot in slipping, is that right? A. Say that once more, please. I don't believe I follow you.

Q. The steps were all alike in every respect, when you inspected them after you had fallen except for the place where the water had gathered in a kind of a scuff mark, you called it? A. Yes, sir.

Q. All the rest of the step was just alike? That was the only unusual spot on the step when you examined it, is that right? A. What made it look different from the rest of the step was that, what we are calling a scuff mark there where my foot slipped. That is what I drug my fingers through, is what my foot slipped off of.

Q. Well, I think we are together. That was just one scuff mark on the step that you saw? A. Yes, sir.

Q. And that was the spot that looked different from every other spot on the step? A. Yes.

Q. And that is where you put your hand to see what it was that was there? A. Yes, where my foot had slipped.

272 Q. And when you did that, you could see that your hand was kind of sticky, a kind of a film—it wasn't any gob of grease, was it? A. No, sir.

Q. It wasn't anything like that; it was a kind of sticky, oily feeling on your fingers when you rubbed them together much as I am doing now, you could feel that it was oily? A. I could tell it was oil or what I took to be oil on my fingers.

Q. Well, my question was, before we got off there, and got back to making sure we understood each other, the scuff mark, if that was a scuff mark that your foot made, it wasn't there before you slipped, was it? The scuff mark itself—I am not talking about the substance. I am not asking you whether that substance as disclosed by the scuff mark was there or not. I am asking you whether the scuff mark was there before you slipped. It was not, was it? A. No, sir, I wouldn't think so.

Q. It was made by your foot? A. Yes, it was made by my foot.

Q. So it wasn't there. Now, then, with it not there, the step looked just exactly the same all up and down it, isn't that right? A. Without close inspection, yes, sir.

273 Q. Alright. Now, then, close inspection means

an inspection closer than you could have seen standing as far as I am away? A. Yes, sir.

Q. There wasn't anything apparent to you on that step before you took you step? A. No, sir.

Q. Nothing except maybe the water, could you see the water? Did you see the step was wet? Did you know the step was wet? A. Well, I could have known it was wet, yes, sir, because in the conditions that we were in, the weather conditions, any time that we were in that type of water, the steps did get wet.

Q. Do I understand that to mean that you think you did know it or did not? A. Yes, I knew the steps were wet.

Q. You knew the steps were wet? A. Yes.

Q. Alright. That was before you went down on this stairs, you knew they were wet? A. Yes.

Q. Alright. A. That's the reason I held on. They always get wet.

274-275 Q. Alright. Now, then, what was the conditions of your shoes? You said you had wiped them! Were you able to wipe them dry? That's a Coco mat, isn't it, just a big one like you might have a smaller one out in front of your door to wipe your feet on? A. Well, it was one of those. I would say it was made out of about the same kind of thing that a rope line is made of.

Q. Well, isn't it what you call a Coco mat, or do you know? A. I really don't know, sir.

Q. Now, then, you had wiped your feet on that? A. Yes.

Q. Before you reached this space forward to where the ladder was? A. Yes.

Q. Back here before you walked up this rubber mat? A. Yes.

Q. Between the lounge chairs. Now, then, how high were your shoes and the soles of your feet after you got through? You didn't look at them, did you? A. No, sir, I didn't hold them up and look at them, no, sir.

Q. Now, then, your shoes have probably been in water off and on for some time, hadn't they, before this 276 happened? I mean the day before, had your feet been in water, been in weather decks? A. Yes, sir, I had been on the deck the day before, yes.

Q. And your feet get wet in that kind of weather? A. Yes, sir.

Q. Did you have more than one pair of shoes there, or did you just have one pair of work shoes and one pair of liberty or leave shoes or homemade shoes? A. I just wore the same shoes all the time.

Q. You wore the same pair of shoes all the time? A. While I was working, other than I had a pair of overshoes.

Q. Yes? A. To use in the yard.

Q. You didn't use your overshoes on this occasion? A. No.

Q. You had just one pair of shoes. You didn't change them then, or didn't have any to change out there, from the time that you had come in on Wednesday until this thing happened? I mean you would take them off to sleep and things like that, I mean you didn't substitute other shoes for them all during the time that you were working from Wednesday when you relieved Rosson's crew on through until the time you fell,—the same pair of shoes? A. Well, yes, sir, while I was working, I wore the same pair.

Q. I think that's what I wanted to understand. Now, then, you wiped your feet on the Coco mat. I believe you finally decided that you are pretty sure that that's what you did, because that is what you always did, but you didn't know you were going to fall, so that was just an act that you did because you were accustomed to doing it. You don't have any recollection of wiping your feet this time at five-fifteen in the morning on October 19th, do you? A. Well, I would say, yes, sir, I am positive I wiped my feet.

Q. Now, that is just because that is your habit to do it, but was there something that made you remember wiping your feet? A. Well, on that one particular day I remember the incident pretty good.

Q. Well, what is it that reminds you or makes you sure that you wiped your feet? A. Well, I fell on that day, I got hurt and you always when something like that happens it makes that day stand out from any other date.

Q. That's right, but you hadn't fallen at that time? A. No, sir.

Q. And you didn't have any premonition, you had no reason to— to think that I was going to fall?

Q. You were not calculating to fall, were you? A. No, sir.

Q. But you remember that you did wipe your feet that day? A. Yes, sir.

Q. Alright, now, then, how dry were you able to get your shoes? I believe you said you did not inspect them after you got through wiping them. You just went through the usual motion to wipe them? A. Yes, sir.

Q. Now, if your feet had been wet for a couple of days, as you say they were, there still was water in the soles of the shoes, wasn't there? A. Well, they would have from the day before, yes, sir. I didn't wear these work shoes when I was off, and I had just come to work the day before.

Q. But you had worked the full day the day before? A. Yes, sir.

Q. And you had made a complete trip out to Block 87 and back into the Magnolia Inn, hadn't you? A. Yes, sir, Eugene Island.

Q. And so you had been working on the ship, and I believe you testified that the weather was a little bit worse on the 19th than it was on the 18th, so the weather on the

18th was pretty blowing, a lot of wind and a good deal of wave action, just a lot of water, is that right?

A. Yes, sir, it had been pretty rough the day before.

Q. Well, you had on occasions been out on this well deck, or I believe some of them call it the After Cockpit? A. Yes, I believe they do.

Q. Alright, you had been out there on a number of occasions, that day? A. Testing lines and throwing off lines, yes.

Q. You might have had to stand up on the stern in here to make your landing or you might not have. A. Yes, sir.

Q. And you had been over on the barge and you had been over on Magnolia Inn, had you not? A. I wouldn't think so, no, sir.

Q. Now, then, well, actually, Magnolia Inn at that time had pretty good cooks—they cooked meals, complete meals, whereas your galley is kind of limited on what you could cook down there, don't you know you all go over there sometimes and get some of those good barge meals? A.

Very seldom, sir. I don't eat that Louisiana garlic cooking.

Q. That's like I don't drink that Louisiana coffee they drink down there! A. Well, I got to like that, but that garlic cooking, I can't go.

Q. But anyway, you could have eaten over there if you had wanted to? A. Yes, sir, it was available. I could have if I had wanted to.

Q. And it was a little bit—the boat, the houseboat, the crew boat, the quarter boat, it was a little bit larger boat than the Stephens, wasn't it? A. Well, not only a little bit, it was a whole lot larger.

Q. It was a whole lot larger? A. It was a whole lot larger. There was a lot more space to move around in.

Q. Yes, sir. Probably they had some lounge and magazines and stuff of that kind? A. Radio.

Q. Radio, television? A. No, sir, I don't believe so, not at that time.

Q. The barges have televisions now? A. Yes, sir.

Q. At any rate, you had had lots of opportunity to get your feet wet on the 18th? A. Yes.

Q. Just like you would any other day that you worked out there? A. Yes, sir.

Q. Whether it is blowing or isn't blowing, you are going to be in contact some way with water? A. Yes, sir.

Q. Now, what kind of shoes were those that you had, work shoes? A. Work shoes, yes, sir.

Q. Then they had leather soles and rubber heels? A. Yes, sir.

Q. Were they high laced shoes or low quarter Oxfords? A. No, sir, I wore leg shoes.

Q. You wore the ankle height leg shoes? A. Oxfords, I believe they call them.

Q. This is called an Oxford, I believe, that I have on, and these shoes that you are talking about, that you had, did they lace up somewhere above the ankle along there? A. Yes, sir, I wore what they call a Policeman's Special.

Q. Policeman's Special? A. Yes, sir.

Q. That was your work shoe? A. Yes, sir.

Q. And it had a leather sole, a sole something like that, leather sole? A. Regular leather sole and rubber heels.

Q. Alright, and do you remember how long you had

had those shoes, was it an old pair or new pair? A. No, sir, I don't remember.

Q. Those leather soles, if you stand in water with them, your feet will get wet, won't they, it will seep through into your socks and your feet, and the leather will absorb some water? A. Well, on that boat your feet wouldn't ever get that wet, no, sir.

Q. Let's talk about the shoes, though—the sole of the shoe will absorb water? A. It will get wet, yes.

Q. And when it does that, wiping won't get the water off of it, will it, because it will be impregnated, and wiping won't get the water off of it? A. You can wipe off what's on the outside, yes, sir.

Q. You can wipe off what's on the outside, but it will still be soft, damp and moist? A. It would be damp, yes, sir.

Q. And as a matter of fact, on any kind of weather in the Gulf, leather stays moist most of the time, doesn't it, mildews? A. Yes, it mildews very easily.

Q. That is a moist condition of leather? A. Yes.
Q. If happens to suit cases, if you happen to bring a straw one aboard, it happens to shoes, belts and 283 stuff like that, leather gets soft and mildews? A. Yes, if it is laid up and not used, it will.

Q. Now, after you fell and after you inspected the top step and you found this film of oil, and you just rubbed your hand in one place, I believe you said, right where the scuff mark was? A. Yes, sir, through the scuff mark.

Q. Through the scuff mark. And you saw this sticky substance on your hand? A. Not sticky, I wouldn't say, no, sir.

Q. Well, was it.—
The Court: We have been over that, Mr. Bolton. Let's go on to something else.

Mr. Bolton: Alright.

Q. Did you then inspect your shoe to see if it had anything on the bottom that made it slick? A. No, sir, I didn't.

Q. You did not then look at your shoe? A. No, sir.
Q. So you don't know whether there was anything on the sole of your shoe itself that might have caused you to fall? A. No, sir, I don't remember inspecting my shoe.

Q. Did you then take a mop or a rag or something of the kind and wipe the step off or have somebody do it? A. No, sir, I went immediately to my engine room.

Q. You went on down to the engine room, and that
284 was your station? A. Yes, sir.

Q. Well, did you think that condition that you had just discovered there was a dangerous enough condition, that somebody else might do the same thing you had done? A. It could have happened, yes, sir.

Q. But notwithstanding that, you did not take a rag or a sponge and wipe it up—I mean if you got all the water off of this with a small sponge? A. No, sir, that wasn't my job.

Q. Alright, you didn't make any effort to clean the condition up? A. No.

Q. You just went on down to your engine room? A. Yes, sir; that was my station, in the engine room.

Q. As a part of your job there as engineer, you had to make a report each week, didn't you? A. Yes, sir, weekly report.

Q. And then there was a daily report which was made on the use of the vessel too, were they not? A. Yes, that is, in addition to the log book.

Q. Yes. And on the crew you were on, Slim Dressel's crew, you took care of a good deal of his paper work, didn't you? A. Yes, sir.

Q. Now, I am going to hand you what has been
285 marked Defendant's Exhibit 4, and ask you if that is not the weekly—I am handing the weekly report for the week of October 24th, ending October 24th, 1950. Now, that was the week which included October the 19th, your work week. I believe that you will find that all of those entries except the signature of Mr. Dressel are made in your handwriting, is that right? A. Yes, sir, it is my handwriting.

OFFERS OF EVIDENCE

Q. We offer DEFENDANT'S EXHIBIT NO. 4.

Mr. Mandell: No objection.

Q. Mr. Bolton: I hand you Defendant's Exhibit No. 5, which is a daily report for the twenty-four hour period ending twelve, midnight, October 19th, 1950. Now, that is the

date and includes the time; and that, likewise, is in your handwriting, is it not? There may be parts of it that are not, or is it all in your handwriting? A. It's got Mr. Dresel's signature on it.

Q. Anyway except for his signature, is that in your handwriting? A. Yes, sir.

Q. And you made that out on that date, is that right? A. Yes, sir.

Q. And you made this Defendant's Exhibit 4; on the date— A. Generally, we make these out two or three days after,—as long as they were all made up by the end of the week—I could have made it out that day or I might have made it out at the end of the week.

286 Q. Alright, but it covers that? A. Yes, sir.

Q. We offer DEFENDANT'S EXHIBIT No. 5.

Mr. Mandell: No objection.

A. That is copied from the Log Book.

Q. Mr. Bolton: Now, on that daily operating report you made no mention, as you did in the Log, of your slipping and falling? A. No, sir.

Q. And on the Defendant's Exhibit 4, which is the weekly operating report, in the place there for remarks, with the printed admonition—it is necessary and important to report all leaks in the halls or other hazards and unsafe conditions—you made no such report?

Mr. Mandell: If it please the Court, I object to that question, because it is improper and unfair to the witness, because Defendant's Exhibit 4, itself, does not say that that report should be made on this report, but says that it shall be reported immediately to the port engineer or foreman, and this witness testified that he did. There is no place for him to make any such thing.

The Court: Overruled.

287 Mr. Mandell: Note our exception.

Q. Mr. Bolton: The question is, you did not make any report of any unsafe condition, on this form? A. No, sir, that wasn't my handling. That would have been the Captain's job.

Q. But except for the Captain's signature, it is entirely filled in by you, is it not? A. I put in what the Captain tells me to, yes, sir.

Q. Now, this one Bilge pump down there, that is in your

business, isn't it, down there? Do you keep up with the Bilge pump? A. Yes, sir.

Q. So you put that there, did the Captain tell you to or did you do it without his telling you so? A. No, sir, that would have come under my engine room operations and I entered it.

Q. The log entry which you saw yesterday and which was made there on that day, you made that out in your handwriting and there is no mention there of any oil on the steps, in the log, is there? A. No, sir.

Q. Were you told what to put in the log or were you just told to make the entry in the log to show that you fell? A. The Captain told me to enter it in the log and he would sign it, which I did.

288 Q. So you made the report as you wanted to without anybody telling you what to put there? A. Yes, sir.

Q. There wasn't any mention of any oil in that report was there? A. No, sir.

Q. And the log is the official report on the ship? A. Yes, sir.

Q. Alright. At that time, I didn't think all of that would be necessary.

Q. At any rate, it is not reported, is that right? A. No, sir, it wasn't.

Q. Alright; now, this place near the top step is pretty far removed from your engine room, it is across the bulkhead from it, there is no communication between that and your engineroom, is there? A. My engineroom is right behind that ladder, yes, sir.

Q. Well, there is no oil that leaks from your engineroom onto that step, is there? A. No, sir.

Q. No grease fittings? A. No, sir.
Q. There is nothing that needs to be oiled or greased in that passageway? A. Not right above it, no, sir.

289 Q. Or near that step itself? A. Yes, sir.

Q. What needs to be oiled there in that passageway near the steps? A. The tiller cable, sir.

Q. The what? A. The tiller cable.

Q. Did the tiller cable run through that space? A. Yes.

Q. The space occupied by the step? A. Oh, no, sir, not by the step, no, sir.

Q. I am talking about occupied by the step itself. A. No, the tiller cables goes through the galley right above the steps.

Q. I don't believe I quite follow you. They go through where, did you say? A. They go through the galley.

Q. The galley? A. Yes, sir.

Q. Above the steps? Do they go immediately above the steps, the cables themselves? A. Right against the overhead, sir.

Q. Well, is it an exposed cable? A. Yes, sir.
290 Q. Is it a movable cable? A. Yes.

Q. Is it regularly greased? A. Yes, sir.

Q. Did it have grease on it? A. Yes, sir.

Q. When you examined that, was that the kind of grease that you found? I believe you described it as being more like used lub oil? A. Yes, sir.

Q. Well, that's not grease, is it? A. Used lub oil is not grease, no, sir.

Q. And there was grease on the cable? A. Yes, sir.

Q. So that was not the same kind of stuff that might have been on the cable? A. Well, I wouldn't say that it was or it wasn't.

Q. Now, then, oil could have come on that step, if any was there, off of people's feet, couldn't it? A. Yes, sir.

Q. And I believe you testified yesterday, that the drilling barge itself and the mud room was a pretty slushy kind of a place? A. Yes, sir, it is—mud, oil.

Q. It is true that the crews you transport dress for shore before they leave those boats? A. They dress
291 for shore before they leave the boat.

Q. When you are getting ready to take a crew in, when you take them off the barge, they are going into Morgan City, they are clean, they have got their shore clothes on; they bathe on ship? A. Yes, sir.

Q. And then they have their shore clothes on? A. Yes, sir.

Q. They don't have their work clothes on? A. No, sir.

Q. They wouldn't have been walking down in that pump-room in their shore clothes, would they? A. They could have been, yes, sir.

Q. Well, they could have been, they could have gone anywhere on the ship, but don't do it, do they? A. Occasionally, I would say they would, yes, sir.

Q. Did you ever see anyone do it? A. Yes, sir, I have.

Q. Did you see anyone do it on that date or anywhere about that date? A. I couldn't say that I did on that day, no, sir.

Q. Now, then— A. I didn't leave the ship on that day.

Q. Alright. Now, where else could oil have come from? We have talked about the overhead pillar 292 cable, you say? A. Yes, sir.

Q. And if it dropped off of the pillar cable, it could have gotten on the top step? A. It could have been tracked on there, yes, sir.

Q. Directly dropping on or getting on that top step, where could grease or oil come from? A. Tracking.

Q. Directly, not any tracking? A. Other than tracking? It couldn't have gotten there.

Q. So the only way it could have gotten there would be to have come in on somebody's feet, is that right? A. Yes, I would think so.

Q. Alright, now, then, you have oil in your engineroom, don't you? A. Yes, sir; plenty of it.

Q. And you keep your engineroom pretty clean? A. Yes, sir, at all times.

Q. You try to keep oil off of the passageway, and off the anything that anybody can get oil from, you kept cleaned up down there? A. Yes.

Q. You had plenty of rags? A. Yes, sir.

Q. And you had bilges, but there is oil down there? 293 A. Yes, sir.

Q. Now, then, on that day, how many trips did you make up that step from the engineroom to where you fell? A. On that day?

Q. On that day. A. I couldn't say. I would have to check my log books to check all of our movements.

Q. Alright, we know we left Magnolia Inn at .0490? A. Yes, I would have had to go in there at that time to crank the engine.

Q. To crank the engine; then you cast off the line? You made one trip up on that occasion, didn't you? A. I wouldn't have necessarily have cast off the line when I cranked up, no, sir. I generally stay in the engineroom.

Q. But it is possible you were up there? A. Yes, sir, it is possible, I could have made the trip.

Q. Then you went back down and if you didn't make any other trip up for the next hour, then is when you made your landing at Barge No. 6? A. I would have come up that ladder.

Q. You would have come out of the engineroom and come up again and that would have been three trips? A. Yes, sir.

Q. And then did you stay up there all the time you were tied up, or did you come back down? A. No, sir, I stayed up there. When we are just alongside for just a short period of time like that, I stay on topside.

Q. And so that would have been the last trip you made before you fell? A. Yes, sir.

Q. But there were two trips on that you yourself had made out of the engineroom up the steps? A. Two, for sure, yes, sir.

Q. Two for sure, and maybe more? A. Could have been.

Q. If you had been up making your log entry or talking to the Captain, you would have made more, gone up in the wheelhouse? A. I would most likely have been making coffee at that time in the morning, that shortly after casting off.

Q. Now, then, there wasn't anybody else on the boat but you and Ashton and the Captain? A. I would have to refer to the log, sir. I couldn't say.

Q. On that morning on the way out? A. Not to my knowledge, there was no one else aboard.

Q. Does this log refresh your recollection that there was no one else on board? A. According to the log, there was no one else aboard.

Q. You didn't take anybody else on board according to your log or according to your recollection until you got out to barge No. 6? A. 6, I believe it is, yes, sir.

Q. 6, it says 6 here in the log book, doesn't it? A. Yes.

Q. I believe you said earlier, maybe 4, but I believe if you will check your log, you will see you were tied up— A. (Reading) "Arrived at Barge 6, at No. 7, Beacon, yes, sir."

Q. Alright, now, there wasn't anybody on board except the crew until you got out there? A. No, sir.

Q. And as soon as you cast off your line there, you came down and that is when you had your fall? A. Yes, sir.

Q. And it is your belief that that oil, wherever it came from, if it were there, had to be tracked, there wasn't any other place? A. There was no other place.

Q. I am going to show you Plaintiff's Exhibit No. 9; and ask you to point to the jury there—this is the ladder, is it not? A. Yes, sir.

Q. This is the tiller cable over here? A. Yes, sir.

296 Q. It does not run through the corridor space at all, does it? A. Corridor space?

Q. Yes, well, ladder space? A. No, sir.

Q. It runs behind it and it is separated from it by the outboard bulkhead? A. Yes, sir, it runs right underneath it.

Q. Underneath the deck? A. Yes, the weather deck.

Q. Now, let's get on to the water. You testified that there were three windows on the port side of the vessel that were over the ladder, is that right? A. Yes, sir.

Q. Now, then, how many of those windows are over the top step of the ladder? A. Directly over it, there is only one.

Q. Directly over the top step of the ladder? A. There is only one.

Q. That is this third window aft, isn't it? A. Yes, that's the big window there, the highest one on the galley, below the handrail.

Q. It is not any bigger than the other two, is it higher?

A. It is higher and also it is larger.

297 Q. Is it larger? A. Yes, sir; quite a bit so.

Q. That's the only one that is higher off the water as is shown on this model, several inches or maybe a foot or two higher off the water than the two forward windows? A. Yes, sir.

Q. These two forward windows are in the galley proper? A. Yes, sir.

Q. They are forward of the most after bulkhead of the galley, aren't they? A. Yes, sir.

Q. So they do not in any way overhang the top step of the ladder? A. No, sir.

Q. Now, this picture here which is Plaintiff's Exhibit 9, specifically shows that, does it not, these two windows here? A. Yes, sir.

Q. This one and this one and another forward? A. Yes.

Q. Do not extend farther aft than the galley bulkhead

which is this area here and that is forward by from here to here? A. Yes, sir.

Q. Of that step? A. Yes.

298 Q. So it did not overhang— A. The ladder; no, sir.

Q. The top step of the ladder—did not overhang the top step of the ladder—it is opposite some of the lower steps at the lower level, isn't that right? A. Yes, sir, the last one would be—it's on the same—looking straight down they would be one end to the other.

Q. But this top window, this high window that you can see in this picture, the one here in the middle of the picture, that one is in the space partially occupied by the deck of the lounge and the first step of the ladder, is that right? A. Yes, sir.

Q. Alright. Now, these two forward windows that are shown in Plaintiff's Exhibit 9, have drip pans around them, don't they? They don't show so well in that picture. Let's see one where it does. Here is a better one. This is Plaintiff's Exhibit 8. Now, this area here, right in here, is a drip pan for the window, isn't it? A. Well, it is not actually a drip pan, sir. It is a part of the decking of the boat.

Q. Well, if the plans and specifications of the boat show it to be a drip pan,—that's what they called it anyway.

A. Well, it may have been their intention to use it for that.

299 Q. Well, there is a hole through the center of the ship from that pan out back into the ocean, isn't there? A. I have been told that there has been one built since I left the Magnolia, yes, sir.

Q. Since you left the Magnolia. There wasn't ever one there any time that you were with the Magnolia? A. Not to my knowledge. Now, there could have been, but within my knowledge there was not.

Q. Within your knowledge there was not, but there is drip pan, about a two-inch plate on the bulkhead that is parallel to the window, isn't it? A. May I say something?

Q. Yes, sir. A. It seems as though there was a hole there that had a copper tubing leading off of it on the outboard side.

Q. And that was while you were with Magnolia that there was such a tubing there, as you remember it now?

A. It seems like I remember a tubing being there. I wouldn't say for sure.

Q. And those two windows there—and they are the ones over the galley proper, we are talking about the same two. Your testimony is that they did leak water in? That was your testimony yesterday? A. That those two windows leaked water in?

Q. That they permitted water to leak in. A. Yes, sir.

Q. Now, then, that condition only obtained when the ship was taking water or had a spray over the bow, or side, isn't that right? A. When it would drip water in?

Q. Yes, sir. A. Yes, sir.

Q. There had to be water against the windows before it would come inside? A. Before it would come inside, yes, sir.

Q. And there were lots of times that that boat didn't take water over the bow and didn't have water against the windows, isn't that right? A. In the middle of the summer when we had calm seas, yes, sir.

Q. At this time, depending on, if the weather was good and you didn't get any water in there at all until the water got bad enough to give you water over the bow— A. Unless the boat had been washed down.

Q. Well, it is washed down in the dock? A. Yes.

Q. And that is putting the hose on the outside of the ship? A. Yes, sir.

Q. Now, those two windows, talking first about them,— those are the windows that you testified about the 301 aluminum eye bolts corroding, isn't that right? A. The aluminum eye bolts?

Q. Didn't you say the aluminum eyes, the aluminum dogs? A. Oh, the dogs on the windows?

Q. Yes. A. Yes, sir.

Q. Now, dogs, to a landlubber is a fixed bolt in a screw type arrangement? A. Yes, sir.

Q. That is what a dog is. Now, those aluminum dogs on those windows over here, you helped replace those yourself, did you? A. Yes, sir.

Q. Now, who assisted you on that? A. Offhand, I couldn't say.

Q. Was it somebody in the yard or was it somebody on

the boat? A. I don't remember, sir, who helped me, or whether anyone helped me at all or not.

Q. You fixed that time as being before you fell? A. I wouldn't say for sure, no, sir.

Q. You are not sure whether it was before or after you fell? A. As I remember it, it was before, but as I say, I wouldn't say for sure.

Q. I may have misunderstood you. I thought you testified positively yesterday that this took place before 302 you fell? A. ~~You~~, sir, I believe that did.

Q. But now is it your testimony you are not sure, or you think it did, or what is your testimony with reference to that? A. It seems as though that it was before I fell.

Q. But it might be later? A. Yes, it could have been.

Q. Alright, now, you replaced those with brass dogs, didn't you? A. Yes, sir.

Q. And then you—now talking still about these two front windows, the forward two windows—and then in doing that, I believe you said you sprung the frame in coming down tight on them? A. Yes, sir.

Q. And that made it worse from a leaking standpoint than it was before? A. Well, I wouldn't say worse. It still leaked.

Q. Would it leak as much or was it better? A. I would say it was better to some extent.

Q. Alright, you were able to stop some of the water? A. Yes, sir, but not all of it.

Q. But not all of it. Now, then, when the water came through, it didn't come a solid stream, did it; or did 303 it? A. When a swell hit and broke right on there, there would be quite a bit of water come in, yes, sir.

Q. Well, would it come in like you would take a hose and just make a solid stream of water or would it come in and leak down? It leaked at the bottom, didn't it? A. All around.

Q. All around. So that water would collect on the inside and run down? It didn't come in in a solid stream of water? A. Well, not that you would say that it would come through in sufficient force that it would get you wet if you were standing next to it, unless the boat rolled.

Q. Alright, if the boat rolled and there was water in those troughs, you might get some water from there,

mightn't you? A. Yes, if the boat would roll, it would slosh out each end of it.

Q. Q. Alright, now, then,—well, if the boat was rolling, it would slosh out the side of it! If you are rolling, you would get this kind of motion, if you are pitching, you would get this kind of motion? A. Yes, sir, it would slosh out at the end of it.

Q. Alright; if you are sloshing, and it would slosh out the end of it if you are pitching, it would slosh out 304 the side of it and— A. If you were rolling.

Q. If you were rolling. Now, then, but the water itself coming through there, didn't come in a solid stream at any time, did it, when the water was— A. Well, now, I am not sure—

Q. Well,—
The Court: Gentlemen, gentlemen, one at a time, please. It is impossible for the Court Reporter to get it when you are both talking constantly at the same time. Wait until the attorney asked the question, and then you can answer, Mr. McAllister. And, you, Mr. Bolton, wait until Mr. McAllister finishes, and don't talk continually both at the same time. And now, let's proceed as rapidly as we can, please, gentlemen, because I want to conclude this cross examination tonight.

Q. Mr. Bolton: Now, a garden hose, a one-half inch garden hose, when you turn on the water enough to get a solid head of water, and I am talking about that as a solid head of water—now, at no time did you ever see water like that come in these windows regardless of the weather, did you? A. No, sir.

Q. The water would come in, instead, as seepage around the frame? A. A good seepage, yes.

305. Q. A good seepage, and not a solid stream, but it would be in drops and not in flowing seepage, would it? A. It would flow, yes, sir. It would run down off of the.

Q. You would have a solid bead of water? A. Yes, sir, as each swell would hit it, you could see the water run off of it.

Q. Alright, now, that's what you mean, that's the worse condition it was in? A. Yes, sir.

Q. And after you had worked on it, you improved that condition and you would get less water? A. Yes, sir.

Q. And if you added diundum, which is a caulking substance, that would help for a while? A. Well, the diundum we used in the end of the trough trying to prevent it from splashing on our ladder—

Q. Splashing on your ladder. Alright, so then the water that fell out of that trough from those windows would have come down the lower step on the lower step of the ladder normally, wouldn't it? A. Well, it could possibly—if the boat would roll and pitch, it could go all the way back, yes, sir.

Q. Well, have you ever seen water coming out of that trough under any condition, to your certain knowledge? Do you ever remember seeing it get on the top step of the

ladder? A. Not that I would say that I have just 306 stood there and watched it get on the ladder, but I have got wet.

Q. I am talking about one step, I am not talking about the ladder generally. I am talking only about one step, and the only step that I am asking you about is the top step of the ladder. A. I couldn't say that I have, no, sir.

Q. Alright. A. It is possible that it did.

Q. It is possible but you never have seen it; so you are not certain that it did? A. No, sir.

Q. Alright. Now, then, we have the window next aft, do you know which one I am talking about? That's the third window back, that's the one above the landing and above the step. Now, that window doesn't have any grip handle on it, does it? A. No, I don't believe it does.

Q. That window was never opened for ventilation, was it? A. I wouldn't say, sir. I don't remember it being open.

Q. You have never seen that window open, have you? A. Offhand, sir, I couldn't say.

Q. Alright, you couldn't walk under it, if it was open, could you? It would obstruct the passageway. A. That's right, it would.

207 Q. And if you look there, there was no plate to fasten that window open, no chain? A. No, sir.

Q. Do you know what I mean? A. No, sir, not that I remember. There is nothing there to hang it on.

Q. You say you have never seen that window open? A. Offhand, I can't say whether it has ever been opened or not.

Q. Now, you didn't have any trouble with that window

leaking the water, did you? A. Yes, sir, that window leaked.

Q. Now, how did it leak? A. It didn't leak near as bad as the rest of them, no, sir.

Q. Not near as bad? A. No, sir.

Q. Would it seep water on occasions? A. Yes, sir.

Q. Did you make any changes to the bolts on that window? A. No, sir.

Q. You never touched that window, you never saw anybody working on that window, did you? A. I believe they replaced those windows, sir. Not that I have seen it before, no, sir,—before the accident, I can't say that I have ever seen anyone touch it.

308 Now, did you ever see before the accident, do you ever remember any time that you ever saw water leaking in around that window? A. Yes, sir.

Q. When was that? A. Anytime when we would get spray against the side of the vessel, it would leak.

Q. Well, how much would leak in there compared to these others, it would be considerably less, wouldn't it?

A. Yes, sir, it would be considerably less.

Q. Well, now, where did that water go? A. It would run down the side of the vessel.

Q. Run down the skin of the cabin? A. On the inside, yes, sir.

Q. On the inside. Describe the water there. How much water was there and where was it coming from? A. Well, as I remember it, right in under that window there is—the inside of that boat is sealed and the part that it is sealed with, is about that much from the skin of the vessel out to the—inside, and that water would collect on that and run down, as I remember.

Q. Is that a little ledge at the deck level that you are talking about? A. No, sir, that is right under the window as I remember it.

309 Q. It would collect there in small or large quantities? A. Well, it would collect enough there until there was enough of it there for the motion of it—for it to go off. It wasn't enough, that it would come in there and just run right off.

Q. It had to collect? A. Yes, sir.

Q. Over a period of time? A. Yes, sir.

Q. Several minutes in heavy seas? A. Yes, sir.

Q. And then when the boat would tip, that water would run off down and it would stick—sail down the inside—
A. Onto the deck, yes, sir.

Q. Onto the deck. Now, then; let's talk now about the water got in from the, leaking around the front window. Now, that is—are those four windows on the front of the wheelhouse, that you are talking about? These two ports were closed ports, were they not? A. Yes.

Q. And you didn't have any leakage there, did you; or did you? A. I couldn't say right offhand whether those ports ever leaked or not. Those, in my opinion, were the best two ports on the boat.

310 Q. Now, then, the water that you say came in around these four spots on the window? A. Yes.

Q. And would get on the wheelhouse deck? A. Yes, sir.

Q. And from the wheelhouse deck would seep down through the deck into the installation? A. There wasn't so much water that got in there around those windows as would come through the hatches.

Q. The hatches are these doors, as we call them? A. Yes, sir.

Q. These right here. Now, then, you would get water in from there when you were taking seas against you? A. Yes, sir.

Q. And that water that would come in there would get on the wheelhouse deck? A. Yes, sir.

Q. And the testimony is that there are some drainage scuppers on that deck, are there not? A. Yes, sir.

Q. This would be more water than would go down the scuppers, or would be water that never reached the scuppers? A. It would be water that never reached the scuppers.

Q. Alright; where were the scuppers? A. At the foot of the landing from the wheelhouse to the lounge area.

311 Q. Were there any other scuppers? A. Offhand I don't remember. That's the only one that I can recall at this time.

Q. That's the only one that you remember and that was down on the lounge deck level? A. Yes.

Q. And there was a scupper there that would take off any water that came down through the wheelhouse steps,

the steps that led to the wheelhouse to the lounge? A. Yes, sir.

Q. The water did leak down into the crew's quarters? A. Yes.

Q. That is up forward in the hold? A. Yes.

Q. That is under the forward part of the wheelhouse? A. Yes.

Q. Then you say the water would leak on the galley and on the galley stove? A. Yes, sir.

Q. The galley stove is over on the starboard side? A. Just starboard of the hatch going into the engine room.

Q. Now, then, in this cabin, as it is in this model, there are two seats, one on port and one on starboard, isn't that right? A. I can only recall one seat.

Q. Well, what side is that on? A. That would be the port side.

Q. That is on the port side? A. Yes, sir.

Q. That is on the side where the ladder is? A. Yes.

Q. Alright. I am not sure that it is, but there is one of these and it shows in this picture, that's it, isn't it? A. Yes, that's the only one in the wheelhouse so far as I know.

Q. Now, what is directly below that seat? A. The galley.

Q. Now, the galley is directly below this deck, isn't it?

A. Well, if you go straight down through from this, you will come into the galley.

Q. This is your stair well, isn't it? A. Yes, sir.

Q. Your stair well is right underneath that seat? A. Yes.

Q. It shows here on this model in that manner, as you can very well see. Now, this exposed beam, the one the grab iron is on, that is located directly underneath that seat up above, isn't it? A. Yes, sir.

313 Q. Alright, sir, there is no deck, wheelhouse-deck, that overhangs where the seat is. You look right straight up to the bottom of the seat. There is no deck up there, is that right? A. No.

The Court: Answer up, please, sir.

A. No, that is not covered.

Q. Mr. Bolton: ~~not~~ covered. Alright. A. Those are exposed ribs there or not ribs but braces.

Q. There isn't any deck above it, so there is not any water seeping through the deck above, is there? A. That's right.

Q. So you couldn't get any water off the wheelhouse deck to fall on that ladder at all, could you? A. Yes, sir.

Q. How? A. It could come right down the side. The deck in there would be tilted forward or would be lower at the level of the ladder than it would at the forward part.

Q. Now, what deck are you talking about, this wheelhouse here? A. Yes, sir.

Q. And would the water have gotten on the step from the wheelhouse deck? Show us here if you can. A. Out where this exposed—where it starts to be covered—
314 it no longer is not covered, where it stops to be uncovered—

Q. That is further forward than two beams. You can see those two beams, one of them has the handrail on it, and the other one forward of that? A. Yes.

Q. So the most after part of the deck, the wheelhouse deck that is in line with those steps is way up in this beam, isn't that so? A. Yes, sir.

Q. Alright, now, then, how are you going to get your water from there onto the top step of the ladder? A. Well, this deck is covered from this portion of this bulkhead here on out.

Q. That's right. A. It can run right along that edge there and down this bulkhead.

Q. Now, when it gets right along that edge and goes down that bulkhead, will it continue on in a straight line until it gets over that step that is two feet back there, or is it going to go like that—right straight on down? A. With the boat rolling and on a painted surface, it can work its way down that way. It won't go in a straight line like that.

Q. Well, it is your testimony that you have never seen water out of that wheelhouse deck, that got on the
315 top step of the ladder and only the top step? A. I wouldn't say that.

Q. You have never seen any water on the top step from the wheelhouse deck, did you? A. I wouldn't say that.

Q. That is the step you are talking about, in the space at the foot of the ladder leading from the lounge to the deck? A. Yes.

Q. And there is a solid bulkhead over this point? A. Yes, sir.

Q. And so any water that would roll down there, would have to overflow the scupper, would have to overflow the

combing, would have to get back on the deck and overflow back over this combing to come in that way, wouldn't it?

A. Yes, sir.

Q. And you have never seen that happen? A. No, sir.

Q. Now, we have covered water from the front two windows, we have covered water from the third window, we have covered water from the wheelhouse; now, then, water could have been tracked in? A. Yes, sir.

Q: Is there any other way that you can think of, water could have been spilled by somebody? A. Yes, sir.

316 Q. You don't know that anybody spilled water and you didn't spill any water? A. No, sir.

Q. Now, then, is there any other way that you could get water in there? A. No, sir, I wouldn't think so.

Q. Is it your testimony that water through this one window, the farthest one aft in the passageway, could have gotten on the top step and water tracked there could have gotten on the top step, but you have never seen or known of water from any other source than those two sources to have gotten on the top step, is that your testimony? A. Yes.

The Court: You will have to answer out, please.

A. Yes, sir.

Q. Mr. Bolton: Now, you testified yesterday, I believe you said that you didn't remember whether it was raining or not at the time you made the east off at Barge No. 6? A. Yes, sir.

Q. Now, I have got your deposition again on page 43, when you were asked this question and I will ask you if you didn't give this answer—Question—Now, describe the weather, if you can, as it was just about the time 317 that you had your fall—Answer—Well, as near as I can remember, it had been rough. I know we had brought the barges in and it was raining. We had quite a bit of wind, for everything was wet.—

Q. Now, does that refresh your recollection that it was raining at the time you were back there? A. As I remember it, I know it had been raining and it had been rough.

Q. Well, now, you said it was raining in this testimony. I know we had brought the barges in and it was raining.—

That means at that particular time, is that what your testimony is? A. Well, at the time we tied up, I couldn't

offhand say that it was raining. I know it had been raining off and on for several days.

Q. Let's talk about your physical condition and about how the thing happened. Now, the first injury that you had with the Magnolia, was this one that happened on the Little, isn't that right? A. Yes, sir.

Q. And will you describe what you were doing when that happened to you? A. I was shifting cement from one pile to another to make it easier for the barge men to put it in their bucket, so they could shift it over to the drilling 318 barge from the boat. I picked up a sack of cement and I turned to put it on the pile and my foot slipped, or I lost my balance and I fell back against the stack of the cement, the main stack of the cement.

Q. Alright, and how long did you suffer with that? A. Well, as I remember that was at night, maybe around midnight or early morning.

Q. That was in October of 1949, just about a year before this other? A. Yes, and I went to the doctor's the next morning when we got to town, a Dr. Gueymard, and he taped it; and I went down there and Dr. Gueymard let me come right on in, and he taped my back up and told me I could go on back and catch my boat, which in the meantime was shifting from where the Magnolia slip is around to the fuel dock. We were going around there to pick up a load of fuel, and I went from the yard on down there and caught the boat.

Q. The question was, how long did your back bother you, that's what I wanted to know? A. About three or four days.

Q. Alright, and then you had no other result at all from that? That was all? A. Yes, sir.

Q. You felt perfectly alright after three or four 319 days. Now, then, when you had this fall, you didn't want to go back to Dr. Gueymard? A. I didn't want to go back to him?

Q. Did Mr. Rhodes offer to send you to Dr. Gueymard, the Company doctor there? A. No, sir.

Q. He did not ever make such an offer? A. No, sir.

Q. When you first came in? A. No, sir.

Q. Alright, you chose your own family doctor? A. Yes, sir, I was in his office with my wife. I had brought her up there and I was sitting in his lounge waiting for her, and

it was giving me so much trouble then, I just went on in to see him.

Q. And was that before or after you had reported your injury in person to the Marine foreman? A. That was after.

Q. Now, then, in 1951, you had a double hernia operation? A. Yes, sir.

Q. Our records show that you were off from work fifty-four days, is that about right? A. As I remember, I was off eight weeks.

Q. Alright. And you were paid all during that time? A. Yes, sir.

320 Q. Now, then, when has been the longest period of time, when was the longest period of time that you were—were you ever free from pain, following the second fall, I mean the first fall? A. Not entirely, no, sir.

Q. Well, was it pretty—would you get to where you had very little pain? A. At times I had good days when I could get around good.

Q. Alright. Now, then, would you have several of those good days in a row sometimes? A. Yes, sir.

Q. Would it be as many as a week, or maybe a month? A. Well, it has been for two or three weeks that I could, as long as I didn't do anything, I was particular with my actions, my movements, I could get around good.

Q. Now, can you tell me when the first time that you had such a period of two or three weeks that occurred after the accident, can you fix that for me? A. No, sir, I really couldn't.

Q. Well, was it in the first six months after you fell? A. I remember it—I went and I got this belt in New Orleans and was wearing it. While I was wearing that belt, I did fairly well.

Q. You got that belt about ten days or two weeks after you fell, wasn't it? A. About ten days, I believe.

Q. Alright. Ten days, that would put it along about the first of November, approximately, of 1951? A. Yes, sir.

Q. Now, then, after you got your belt on there, you say you felt pretty good for some little time? A. Yes, sir.

Q. You felt a lot better than you did before you got your belt? A. Yes, sir.

Q. And felt like you were getting well? A. I thought I was, yes, sir.

Q. Alright. You think that was the longest period of good feeling that you had? A. Well, there was for a while there, two or three weeks there, I was getting along fine. I thought I was going to, just like the other time, I thought it was going to be alright, and then I started those pains, especially after a long trip. If I had to be on my feet for quite a while, why then it started giving me quite a bit of trouble.

Q. Well, now, how does that compare with your good periods that you have? You have some periods now that are better than others, don't you? A. Yes, sir.

322 Q. Now, can you tell me whether you feel better or worse now during your best times than you did during your best times back there then? A. About the same I would say.

Q. About the same. When you are feeling good you feel about the same as you did then? A. Yes, sir.

Q. Now, then, when you went to the Marine Hospital at Galveston— A. Yes, sir.

Q. —you were there as an out-patient and then you were there for several day as an in-patient? A. Yes, sir.

Q. And when you were discharged they told you you were fit for duty? A. Yes, sir.

Q. In three days, isn't that what your discharge was? A. Yes, sir, that was to give me time enough to get back to the ship.

Q. They said you were O. K. then but they would date it for three days to give you time to get back to your ship? A. Yes, sir.

Q. Now, then, instead of that you went to Houston the next day, didn't you? A. I don't recall, sir.

323 Q. Well, if you were discharged on the 4th of August and you were examined by Dr. Brodsky in Houston on the 5th of August, that was the next day? Isn't that right? A. If I was examined by him, yes, sir, I had to have been there.

Q. Alright. Now, then, had you at that time employed an attorney? A. Yes, sir.

Q. At the time you went to Dr. Brodsky you had employed an attorney? A. Yes, sir.

Q. Had you employed an attorney before you were discharged from the Marine Hospital? A. No, sir.

Q. So you—(The witness interrupted) A. Yes, sir, I believe I had.

Q. You had employed an attorney while you were still in the Marine Hospital? A. Yes, sir, I believe so. Now, I wouldn't say for sure.

Q. And when you started back then with your three days fit for duty in three days—you were fit for duty and you had three days to get back—at that time you had already employed an attorney to bring a lawsuit, this lawsuit here,

is that right? A. Yes, sir, I think so, that I had
324 already seen Mr. Mandell at that time.

Q. Now, then, you were in Marine Hospital in Galveston—you were in the Marine Hospital for a short time and examination in New Orleans? A. Just for an examination, yes, sir.

Q. Now, then, you found out what kind of a treatment was available for you at the Marine Hospital, didn't you? You had talked to the Doctor in charge or whoever was in charge of admissions and they talked to you about that, didn't they? A. They didn't tell me nothing there. They just put me in there and I took what they brought me.

Q. Alright. But while you were there did you or not find out whether they would fully treat you for whatever they thought was wrong with you? A. They didn't tell me anything, sir.

Q. Did you ask them anything? A. No, sir.

Q. You just took what they did and then when they told you you were well, why you left? A. I asked that Doctor Wong, the Ward Doctor, I talked to him when he told me—I wanted to know what chances I would have of holding up. So he told me—he said, "Well," he said, "You are feeling pretty good now." And he said, "And we can't discharge you as long as you say that—well that's the only
325 way we can discharge you." In other words—

Q. You have got to be feeling good before they will let you go, is that your testimony? A. He told me that he wouldn't guarantee that that wouldn't come back on me. And I told him—I asked them for the operation

Q. What did he say about the operation? A. Well, then he told me that they would have to try that conservative treatment.

Q. But he led you to believe that they could give you an operation if they found it to be necessary? A. If they thought it was necessary, that they would.

Q. Now, all the treatment that you had in the Marine Hospital is without cost to you? A. That's right, other than transportation to and from.

Q. Alright. And they also go so far as to give you dental treatment, if you need it, don't they? A. Yes, sir.

Q. There is no limit on what kind of treatment you can get at the Marine Hospital, for a Merchant Seaman that you know about? A. No limitations that I know of, no, sir.

Q. Now, then, at the time that you left the Marine Hospital and went to Dr. Brodsky and put yourself under his care, you had no intention then of going back to the 326 Marine Hospital, did you? A. That's the reason I

talked to Dr. Wong. I asked him—when I looked on my discharge and he said "discharged fit for duty", why then I had this conversation with him and he told me at that time, he says, "Now," he said, "We are going to discharge you for duty because we have to put it 'discharged for duty' because that's the only way we can discharge you."

Q. Did you ask to be discharged? A. No, sir.

Q. Alright. A. But he told me; "If you need further treatment, then you can come back."

Q. But you went immediately to Houston, Texas, 50 miles away and put yourself under the treatment of another doctor the next day? A. My family was there, yes, sir.

Q. The next day. But you intended then to go back to Morgan City, didn't you? A. Yes, I did go back.

Q. And you told your lawyer you were going back and go to work, didn't you? A. I suppose I did tell him, yes, sir.

Q. And did you tell him you would be seeing him 327 in a few days? A. No, sir, I didn't.

Q. When you did leave the Marine Hospital you were having some of your good days, weren't you? A. Yes, sir.

Q. When you were examined by Dr. Brodsky, you were having a good day? A. Yes, sir.

Q. Now, have you told Mr. Mandell in response to his questions about all of the employment of any kind that you have had since you last worked, in August of 1953, for

Magnolia Petroleum Company, have you told about every day of gainful employment? A. Every day that I worked, yes, sir.

Q. You have already related that? A. Yes, sir.

Q. Where do you now live? A. Well, I did go back to the Magnolia.

Q. But I mean other than Magnolia, that was in August 1953,—you haven't been back since then to work for Magnolia, have you? A. No, sir.

Q. And every other occasion that you have actually worked since that time, you have already told us about, in response to Mr. Mandell's questions? A. Yes, sir.

328 Q. Where are you now living? A. At Arcola, Texas.

Q. Is that near Alvin? A. Well, I am not too familiar with that section. I don't know just how far Alvin is, but I know it is on toward Galveston.

Q. Alright; whose place do you live on, now? A. Mr. McMillan's.

Q. And does your family—is your father living there too? A. No, sir.

Q. Now, then, who is living at the household, who is in the household where you are now living? A. No one at the present time, sir.

Q. No one but your wife and your child? A. Yes; we live there; my wife and two children and myself.

Q. That is the house that belongs to Mr. McMillan? A. Yes, sir.

Q. Do you pay him rent on the house, or do you work for the rent, or does Mrs. McAllister help on the rent? A. My wife has a job there, yes, sir.

Q. She has a job there? A. Yes, sir.

Q. Now, what is the nature of the business that he has there? A. Well, he is a poultry man, general, and poultry processing.

329 Q. Alright, do you help in any way around the place? A. Oh, I help my wife what I can.

Q. Do you help her as she works at her job? A. Well, actually we are not working yet. We haven't started anything at the present time.

Q. Well, what kind of work are you to do there? A. Myself, none.

Q. I see. Is he also in the construction business and owns some brick houses there? A. He is a construction man. I don't know what he owns.

Q. Well, hasn't he talked to you about cleaning up some of these brick houses before they actually are put on a real estate market? I mean, aren't you to do something of that kind? A. No, sir.

Q. Alright, that's all.

Re Direct Examination

By Mr. Mandell:

Q. How long a time do you make it a practice to be away from the engineroom at any one time? A. Ten or fifteen minutes at the most.

Q. Now, then, at the time you tied up at the dock, to pick up those men at five o'clock in the morning on October the 19th, I believe the record shows that it took about fifteen minutes to tie up. Were you then on the way back to the engineroom? A. Yes, sir.

Q. Is that about as long as you permit yourself to be away from the engineroom? A. Yes, sir.

Q. Now, then, with reference to the port holes or windows leaking, did you yourself see water leaking from the window that I am pointing here, which is the largest window right immediately above the steps? A. Yes, sir, I have seen water leaking from there.

Q. Did you yourself see the water from that window leak on that very step that you slipped and fell on? A. Yes, sir, it would leak onto this approach, then run down all of the steps.

The Court: The question was, did you see it.

A. Yes, sir.

Q. Mr. Mandell: Before you were hurt, did you yourself ask the Marine Foreman for new material to put around the window that was leaking right above the steps?

A. Not the Foreman, no, sir.

Q. Who did you ask? A. The Captain.

Q. As long as you have been there, was new material placed, especially until the day you were hurt, or a day or so after you were injured, placed around that particular window? A. No, sir.

Q. Do you now recall whether you specified the type of material that you put around that window? A. As I remember it, talking to the Captain, we were talking about this aluminum, how fast it would eat out—we suggested or thought among ourselves that we should put brass ones on there.

Q. Was a brass frame ever put around there as far as you know? A. No, sir.

Q. Did the Captain of the vessel ever tell you what kind of material would finally be supplied? A. Yes, sir, he told me that we were waiting for a new type of aluminum that did not corrode, that the salt water wouldn't eat up.

Q. Mr. McAllister, Mr. Bolton brought in this, that he says was the step that was there on the day you fell, and asked you to step on it. Will you tell this jury, while that vessel was in this choppy water leaving that place that you checked out to these men, was the footing there as solid and immovable as it is in this courtroom here? A. No, sir.

332 Q. As you walk down from the first platform down onto the first step, could you see anything else except that place, except that the place was wet with water, without stooping down to see what it was on there? A. No, sir. I can't think anymore: I have sat here so long, I just can't stand it any longer.

(Recess until Wednesday, March 9th, 1955, at which time the re direct examination of the plaintiff, McAllister, was continued by Mr. Mandell as follows:)

Q. Mr. McAllister, when you stepped over the combing onto the deck immediately above the first step on which you say you slipped, could you then see what was on that step? A. Yes, sir, I could see that there was water on it.

Q. Could you then see where that water was coming from? A. Yes, sir.

Q. And where did it come from? A. From those three port holes or windows right about and alongside the ladder.

Q. The three port holes, the two smaller ones and the larger one, which is a little bit higher up? A. Yes, sir.

Q. Now, the log book shows that you were fifteen minutes tying up and letting go of the lines to pick up the Magnolia

Company employees from the drilling barge and getting them on board and getting ready to go? A. Yes, sir.

Q. Your practice and your employment as an engineer aboard this J. C. Stephens—how much at any one time when the vessel was under way, did you permit yourself to stay away from the engineroom? A. I make a round through most of my engineroom every ten or fifteen minutes at the most.

Q. Now, then,—by the way, just before you went back to the engineroom, I believe you testified that you were on the starboard or the right side of the vessel looking forward and back aft? A. As I remember it, yes, sir.

Q. Now, then, whether you would have gone either on the outside of the vessel or on the starboard or on the port side, there was—was there any way of you getting back to the engineroom without attempting to use the stairs that you did use? A. No, sir, that's the only entrance.

Q. And of course the minute you went inside the—I mean the minute you went under the canopy and inside the lounge, you were of course out of the weather? A. Yes, sir.

Q. Now, then, from the position that you were in, looking down these steps, did you see or could you see 334 whether there was any oil mixed with that water?

A. No, sir, I couldn't. That was in the early morning.

Q. Now, then, in addition to that, Mr. McAllister, was there any scuffing-like of the type that you showed to the jury when Mr. Bolton interrogated you? Was there any scuffing on that ladder before you put your foot on it? A. If there was, sir, I didn't see it.

Q. As far as you could see, there wasn't? A. No, sir.

Q. Is that correct? A. Yes.

Q. Well, you said, "No, sir". Is that right? Is that what you mean? A. That's right, yes, sir.

Q. Now, then, after you fell and you collected yourself and put your hand around there, and as you put your hand did you see at that time that that particular scuffing was of a different color than the rest of the step? A. Yes, sir.

Q. Was it then that you discovered that the substance was a watery-like, like water with a scum of oil on it? A. Yes, sir, by looking at it and I ran my hand through it, I could feel that it was oily, yes, sir.

Q. Now, then, I believe you testified that Mr. Ashton, the deckhand, was there with you when you made that test? A. Yes, sir; we both looked at it.

335 Q. Alright. Now, then, when you left to go to your engineroom, was Mr. Ashton still in the galley? A. Yes, sir.

Q. And whose duty was it to keep those steps clean? A. The Captain's and the deckhand's.

Q. Well, was the deckhand right there? Did you leave him right there when you went into the engineroom? A. Yes, sir, he was in the galley when I went on into the engineroom.

Q. Alright. Now, then, yesterday Mr. Bolton introduced in evidence and asked the questions about Defendant's Exhibit No. 4, styled Magnolia Petroleum Company Inspection Report. He read to you this part, reading as follows:—It is absolutely necessary and important that all leaks, hazards or unsafe conditions be reported immediately to the port engineer or foreman.

Now, as many times as you made out these reports for the Captain, was it the practice in compliance with this request on Defendant's Exhibit No. 4, to make a report on this piece of paper, or was it as it says, to make it direct to the port engineer or the foreman? A. Well, as a rule, sir, I reported it to the Captain and he reported it to the port engineer or the Marine Foreman.

Q. Who was the Marine Foreman then? A. Mr. Rhodes.

Q. That is the gentleman who was here yesterday? A. Yes, sir.

Q. I believe it is true, is it not, I believe you testified that in your presence the Captain did before you were injured, report this very condition to Mr. Rhodes? A. We discussed it, yes, sir, and Mr. Rhodes frequently came aboard the Stephens for coffee, and we would sit down and talk, and talk about various things on the boat, and it was discussed on the vessel, yes, sir.

Q. Now, then, with reference to Defendant's Exhibit No. 5, which is evidently a twenty-four hour period report and dated October the 19th, that you also filled out for Captain Dressel. It shows exactly what you testified, the time you left and the time you came back. Now, down below, it says—that's important. I want you to look at this report and

Q. And how long have you been following the occupation of Marine Surveyor? A. As a Marine Surveyor and independent surveyor in my own business for about, I will say approximately, eight months.

Q. And what kind of work did you do before that? A. I was a Marine underwriter for two years, and then did survey work for the Marine Insurance Company.

Q. Now, what license or certificates do you now hold in addition to the Master license? A. Well, sir, you mean—

Q. Do you have to have any certificate as Surveyor? A. No, sir.

Q. Your Master license also covers that? A. Yes.

Q. Do you have any membership in any professional organizations with reference to surveying and Master and so forth? A. Yes, sir. I belong to the International Organization of Masters, Mates and Pilots. I also belong to the Society of Marine Architects and Marine Engineers.

Q. In your experience as a Master and as a Marine Surveyor, have you had occasion to inspect and determine the fitness either of the vessel itself or of a part of a vessel, such as port holes, whether they are weather tight or leaky or things of that nature? A. Yes, sir.

Q. Now, in your experience as a Master and a Marine Surveyor, can you tell the Jury, please, sir, what are the requirements with reference to port holes, and when we speak of port holes, we mean these windows that we have discussed here, with reference to their being watertight, and when they are closed, not to permit any water to get to them.

Mr. Bolton: If the Court please, I am going to object to that, unless he testifies that it applicable to the class of vessel of which the Stephens is included.

Q. Mr. Mandell: Well, I will be glad to qualify him on that. In your experience both as a Master and as a Marine Surveyor, did you have occasion to serve on vessels similar to the type and size of the J. C. Stephens that we are discussing here, and I believe Defendant's Exhibit No. 5, speaks of the vessel as a crew-type vessel, thirty tonnage and fifty passengers—is that the way it say or—I mean capacity, fifty tonnage and thirty passengers? A. I have never served on a crew boat as such, but I have served on similar vessels of similar size and construction.

Q. And have you had occasion to survey vessels of similar type? A. Yes, I have.

Q. Will you please tell the jury whether port holes on a vessel such as this type can be made and are required to be water-tight? A. That's correct.

Q. And now, generally speaking, sir, do you know from your experience and occupation as a Master Mariner and as a surveyor, what effect this salt water will have on aluminum? A. My experience has been and observation has been that salt water will tend to corrode aluminum.

Q. Now, then, in your experience as a Master Mariner and surveyor, what is generally and customarily the material used around the port-holes in order to make them water-tight and resistant to corrosion from the element of salt water? A. Either brass or bronze.

Q. If you had a vessel of the type of the J. C. Stephens and you had port holes over a stairs leading to and from the galley, can you tell us whether in your experience as a Master Mariner and a surveyor that a vessel such as the type of the J. C. Stephens, that encounters water every day, where they would have three, four, big waves and sprays splashing against that type of port hole, whether or not it would particularly require port holes over and above either a passageway or a stairway to be particularly water-tight? A. Yes, sir, I would say they should be.

Q. And why is that, Captain? A. For the reason that if they are not water-tight, water will probably get inside and get on the stairs and therefore make it slick, which is a dangerous condition.

Mr. Bolton: If the Court please, I ask that the last—the voluntary portion of his answer be stricken.

The Court: Sustained. Gentlemen, you will not consider for any purpose the last statement of the witness with reference to the condition, as being a voluntary statement.

Mr. Mandell: Is it limited to the particular words, "dangerous condition"?

The Court: It is limited to his description of the steps, yes, sir.

Q. Now, then, from your experience as a surveyor and a Master Mariner, has it been your experience and has it been your duty to observe and take precaution whether

as Master Surveyor or Master of a vessel, to determine that all measures are taken to make steps safe for anyone using steps aboard a vessel? A. Sir, if I may, I will answer the last part of your question first.

Q. Yes. A. As a surveyor, my duty is to observe, 373 the condition of a vessel or a particular part of a vessel if I am requested to do so and report on the matter together with my recommendation.

Q. Now, then, as a surveyor, if you were to survey a vessel such as the type of the J. C. Stephens and find that the frames around the port holes are made of aluminum and reports have been coming that water, sea water, spray water would come through these port holes or underneath the port holes or the gasket and down onto the steps, then what would the recommendation be?

Mr. Bolton: If the Court please, I object to that as being irrelevant to the controversy here. It is not a question of the survey of the vessel or as to what this man would recommend. It is irrelevant and it expresses a conclusion.

Mr. Mandell: If the Court please, this man is an expert.

The Court: Overrule the objection.

Mr. Bolton: Note our exception.

Q. Mr. Mandell: What would your recommendations be? A. My recommendation would be in general to make it water tight.

Q. And what steps, if any, would you recommendation, keeping in mind the facts that I have given you, to be taken in order to make it water tight? A. Well, sir, of course I have heard the testimony about these particular port holes, but in order to make concrete recommendation, I would have to observe the actual port holes and the actual conditions.

Q. I see. Let's assume these facts, that the actual port holes and the actual conditions of the port holes we are discussing on the J. C. Stephens, over and above the steps leading to the galley of this vessel were leaking, that they were not water tight, but that water would come through, and the water would fall on these steps. You would also know by your own examination that the frames were aluminum and that corrosion had set in causing the gaskets to move away from their proper place, and that some caulking compound would not stay even put, then what would your recommendation be? A. Well, assuming those facts to be

the actual case, then I would recommend that new gaskets be installed, or better, I believe that I would recommend a different material for the frames.

Q. What type of material? A. I would recommend either brass or bronze.

Q. Now, are these type of materials resistant to corrosion from the sea? A. They are more resistant than most metals.

375 Q. Alright. Now, then if you were a Master of a vessel, and by the way, can you tell this jury, sir, from your experience as a licensed Master Mariner, who has complete control and command on a vessel on the type of the type of the J. C. Stephens? A. The Master or Captain.

Q. And who has duty, the final duty on board, to see that the port holes, steps, and the places where people, where employees have to walk up and down must be made safe for them? A. That is the duty of the Master.

Q. Now, then, if you were a Master and noticed such a condition, then what in accordance with your duties as a Master and in accordance with whatever laws there may be governing Masters of such a vessel, would then be your duty? A. My duty would be to communicate the situation to my owners, or if communication with my owners was impossible, then to take steps on my own responsibility to remedy the situation whatever it might be.

Q. Now, then, Captain, in your capacity as a Master Mariner, as well as a surveyor, I believe you had an opportunity to look and see the type of stairs that were brought in, that were used on that vessel. Can you tell this jury, if you knew, what effect sea water would have if over a period of six, eight months or a year, sea water

376 would constantly from time to time fall on the type of steps as these? A. Yes, sir, if over a period of time, sea water would wash back and forth on a material such as this, or any other given surface particularly, in as much as sea water has a heavier consistency than fresh water has, due to the salt in sea water, a deposit of salt would be left on the surface and in particular inbetween these spaces of the rough surface,

Mr. Bolton: Excuse me just a minute. I don't believe I understood that answer. Would you please repeat it?

A. Yes, sir. If over a period of time, sea water washes

over any surface, any surface at all, a deposit of salt, even though it may be dry from time to time, there is a deposit of salt, a residue of salt left.

Q. Mr. Mandell: What effect would that have if on top of that salt deposit, more sea water would come and personnel of the vessel would walk on it? A. I would say it would become slick.

Q. Can you tell us then whether or not in your opinion as a Master Mariner and as a surveyor, whether that is not one of the reasons why port holes such as we are talking about must be water tight? A. Yes, sir, that is one of the reasons.

377 Q. Now, from your experience as a Master Mariner and a surveyor, is there any difficult job to get a port hole such as this to be completely water tight?

Mr. Bolton: We object to that as calling for a conclusion, whether it is difficult or not.

Mr. Mandell: I will change the question, Your Honor.

Q. In your opinion, Captain, do you know whether or not such a port hole as the one I described can be made completely water tight?

Mr. Bolton: I am going to object to that unless he shows that the Captain has had some experience with port holes of the type described.

Q. Mr. Mandell: I think I will qualify him on that.

The Court: Allright.

Q. Mr. Mandell: Have you had experience in surveying or by being a Master, in taking measures to get port holes from time to time, water tight? A. Would you repeat that question, please?

Q. Have you had experience, whether acting as a Master or in any capacity about a vessel, or a surveyor, in taking steps that port holes be made water tight? A. Yes, sir.

Mr. Bolton: Did he say port holes of this particular type. I didn't understand him.

378 Mr. Mandell: Yes, of this type.

A. Yes.

Mr. Bolton: Allright.

Q. Mr. Mandell: Now, can you tell us, sir, in what manner a port hole such as the one shown on the J. C. Stephens, with reference to them being made water tight, if properly constructed of proper material, would differ from any other port holes? A. If I understand you, you asked me in what

manner would these port holes differ from any other port holes if they were made of proper materials and proper construction?

Q. That's right, to make them water tight. A. I don't see where they would differ from any other port holes.

Q. Now, then, any vessel the type of the J. C. Stephens—is a vessel of the size of the J. C. Stephens—if you know from your own experience—expected to go out to sea where it is shallow water near the Louisiana Coast around Morgan City, Louisiana. By the way, are you acquainted with those waters? A. Yes.

Q. Is it expected in a vessel of this type to make the voyage out—let's see where is that? (Plaintiff's Exhibit 14.) Is it usual for a vessel such as the Stephens to make a trip from Morgan City, Louisiana down to what is called Beacon No. 7, if the weather is such that at 379 Eugene Island in that area, Coast Guard reports the weather to be somewhere from twenty-five to thirty miles wind? A. If the vessel is properly maned and equiped and is seaworthy, I should say not unusual.

Q. Is it expected of a vessel properly maned and equiped and generally seaworthy, is there any reason that you know of from your experience as a Master Mariner why a vessel of this type should not go out? A. No, reason at all.

Q. If the Coast Guard report as of six a m, October 19th, 1950, showed that the wind was northeast twenty-five to thirty miles per hour—will you look at that report and tell me, can you translate to us what that means—is it a moderate or strong, or what would you call that? A. Let me look at the report.

Q. Yes, sir.

Mr. Bolton: I would like to have it offered in evidence.

Mr. Mandell: We will offer it in just a moment.

Mr. Bolton: That is the one I furnished you, is it not, Mr. Mandell?

Mr. Mandell: That is the one that you asked me to agree on and I said I would agree to it.

Mr. Bolton: Alright.

380 Q. Mr. Mandell: Speaking about the Coast Guard Report— A. (Inspecting the report.) What do you want me to answer?

Q. What do you Mariners call this type of weather, light, gentle, moderate, fresh, strong or what? A. Well, a breeze

of twenty-five or thirty miles an hour, that would be called, I believe, a fresh breeze.

Q. Now, this according to what you Mariners call a Buford Windscale? A. Yes, sir.

Q. And that is an accepted scale by all mariners throughout the world, is it not? A. Yes.

Q. Is such weather an unusual, unexpected, unforeseen type of weather? A. No, sir, not for this time of year, no, sir, October.

Q. Now, then, if weather is expected that might be too much for a vessel of the type of the J. C. Stephens, do you know whether or not in October 1950, the Coast Guard as its practice, issues daily or more than once a day advices to all vessels as to weather conditions in that area so as to guide the owners or the Masters as to what to do depending on the type of vessel. A. Do you mean radio advisors?

381 Q. Yes, sir. A. Yes, sir, I believe that they do.

I am not entirely familiar with the radio schedules for weather reports in the Mississippi Delta area. However, I believe most of the areas which are able to receive radio weather information receive it at noon and at about seven o'clock in the evening, if they have radios.

Q. Do you know, regardless of whether the vessel may or may not be equipped with radio, whether an owner around the Louisiana Coast has available by contacting the Coast Guard, any time they wish, in order to determine what the weather is or what it might be expected to be?

A. Yes, I believe that's public information.

Q. A part of the services the United States Government gives to American Shipping? A. Yes.

OFFER IN EVIDENCE

Mr. Mandell: We offer Plaintiff's Exhibit No. 34.

Mr. Bolton: No objection.

Q. Mr. Mandell: I hand you now an A. H. Glenn and Associates—it probably came out of New Orleans, addressed to C. D. Conn, Magnolia Petroleum Company at Beaumont, Texas. I want you to check that and see whether the report given by A. H. Glenn and Associates purports to be a report of the actual weather condition or simply an instrument of it.

(Recess)

Q. I asked you whether or not that instrument you are looking at, is it or is it not, an instrument of the weather conditions rather than a direct statement? A. Yes, sir, now, you are referring to that part of this first page?

Q. Yes, sir. A. Yes, sir, it appears to be, from the language used in it.

Q. Will you read it, please, sir? A. The whole thing?

Q. Yes, sir. A. Allright. (Reading Plaintiff's Exhibit No. 34.) This is on the letterhead of A. H. Glenn & Associates, Meteorological Consultants in New Orleans, dated May the 28th, 1954, addressed to Mr. C. D. Conn, Magnolia Petroleum Company, Post Office Box, 3311, Beaumont, Texas. Dear Mr. Conn: In reply to your request of May 26th, 1954, I have checked our records and those of the U. S. Weather Bureau in New Orleans to determine the wind, sea, and weather conditions at Beacon No. 7, Eugene Light, Louisiana, at six a m, Central Standard Time, October 19th, 1950. The data we have been able to locate was as follows: our weather maps and advisories show that at the time in question, a tropical storm was located in the Gulf at 25.8 degrees North Latitude, at 91.5 degrees West Longitude; which is approximately 250 statute miles south of Eugene Light. On the basis of calculations, using our weather map for this date and standard wind and wave formula, we estimate the condition to have been, wind, northeast thirty to forty miles per hour, waves two to three feet, wind waves from northeast, one to two feet. Swell from southeast, weather cloudy with intermittent rain.

Mr. Bolton: Didn't it say what the swell was from the southeast?

A. No, sir, it just said—now, this is the way it is with no punctuation—waves two to three feet wind waves from northeast one to two feet swell from southeast. Now, I don't know whether he means one to two foot swell or that the wind wave was two to three feet. This estimate is consistent with observations received from land stations in South Louisiana, Commercial Ship observations, hurricane reconnaissance aircraft operating in the area at the time and reports from offshore oil rigs. The U. S. Weather Bureau has informed me that their maps show that the U. S. Coast Guard observed and reported the following conditions at Eugene Light at six-thirty a m, October 19,

1950. On page two—Wind northeast, twenty-five to thirty miles per hour, sea rough, weather cloudy, barometric pressure, 29.70 inches, temperature, 69 degrees. If 384 any further information regarding weather conditions on this date is desired, I will be glad to amplify on any points in question. Yours very truly, signed A. H. Glenn, and a number of titles.

Q. Mr. Mandell: Now, I will ask you does it or not appear from Plaintiff's Exhibit No. 34, that the Coast Guard gave direct findings to these gentlemen of the estimate of the weather? A. That's the way it appears, yes, sir.

Q. Now, then, assuming that it was thirty or forty miles per hour wind, do you recall what you mariners consider that according to the Buford Wind Scale? A. Yes, sir, that would be getting into gale force.

Q. Is this a Buford Windscale? A. Yes, sir.

Q. We have here 32 to 28? A. Yes, sir.

Q. And what does that show? A. Well, that is a strong wind.

Q. Alright, during that type of weather, do you know from your experience whether a vessel such as of the type of the J. C. Stephens, assuming that she is seaworthy and properly maned and with proper port holes, weather tight port holes, whether there is any reason why she 385. should weather that type of weather? A. No, sir.

Q. Now, then, keeping in mind your experience as a surveyor and as a Master Mariner, having served on vessels of this type and larger, if you had port holes that are not water-tight and water leaks through them and—calling particular attention to Plaintiff's Exhibits No. 8 and No. 9, and taking No. 8 first, you will note this angle iron that forms like a straw underneath the two windows above the galley there? A. Yes.

Q. Do you notice that? A. Yes.

Q. Alright, and again—

Mr. Bolton: I object to Mr. Mandell's statement that those were above the galley steps. I believe the evidence shows that those two windows are forward of the galley steps.

Mr. Mandell: No, sir, I say they are above the galley steps.

The Court: Well, that is the point in issue. Just refer him to the picture without referring to the location.

Q. Mr. Mandell: Then you have No. 9.—you notice the same two windows, do you not? A. Yes, sir.

386 Q. And then you notice this other window? A. Yes, sir.

Q. Now, this other window we are talking about is the larger window, is that correct? A. That's right.

Q. Now, then, assuming that water accumulated in this part shown in Plaintiff's Exhibit No. 8, can you tell us what the effect, if there is some accumulation of water, the effect of pitching of a vessel such as this and the rolling of the vessel, as to what would happen to the water accumulated there? A. Yes, sir, if for example, the troughs were full or half full, water would probably in the course of rolling and pitching, slosh up and down.

Q. Now, if it sloshes up and down, depending on the degree of pitching and rolling, in your opinion, if you can tell the jury, could such water have landed on any of the steps including the first step? A. It is my opinion that it could, yes sir.

Q. Now, then, directing your attention to Plaintiff's Exhibit No. 9, and there was a smaller picture that was introduced, I think—shows that there is more trough here on this larger window? A. Yes, sir.

Mr. Bolton: Here it is.

387 Mr. Mandell: Thank you, sir. It is Plaintiff's Exhibit No. 6, this being it, is it not?

A. Yes, sir, that's the way I understand it.

Q. Now, then, water coming through this window, and again depending on how the vessel pitches and rolls, whether in all probability, in your experience as a Master Mariner, would such sea water fall? A. Well, in all probability, it would go right down the bulkhead, or in other words, from here, from the same window—

Q. Yes. A. It would go right down the bulkhead this way.

Q. And would such sea water, in all probability, fall and accumulate to some extent on the first step? A. If I believe if sufficient quantity came in, yes, sir.

Q. Now, then, in your experience as a Master Mariner, in the exercise of your duty as a Master, would such a condition render a port hole safe for use?

Mr. Bolton: If the Court please, I object to that because it calls for a conclusion on a non-expert manner.

The Court: I sustain the objection.

Q. Mr. Mandell: Is such a port hole what we, or what a Master or surveyor would term as a seaworthy port hole?

388 Mr. Bolton: We object to that, because it invades the province of the jury on the question of fact.

The Court: I sustain the objection.

Mr. Mandell: Note our exception.

Q. In your experience as a Master, in the exercise of your duties as a Master, would such a condition be permitted to exist? A. No, sir:

Q. I don't believe I asked you, how long have you been or had your license as a Master Mariner? A. I have been a licensed Master for seven years.

Q. And how long have you been following the profession of going to sea? A. Since I was approximately twelve years old.

Q. How many years is that? A. Well, I am thirty-three now, about twenty-one years, that would be.

Q. Your witness.

Cross Examination

By Mr. Bolton:

Q. How long has it been since you have been the Master of a vessel? A. Just a minute, approximately three months.

389 Q. What was that vessel, sir? A. The name of the vessel was the Motor Vessel Augusta.

Q. What sized craft? A. She is a 110 foot twin screw Diesel.

Q. What is the home port of that vessel? A. Houston.

Q. And who is the owner? A. Mr. A. A. Brown of Blessing, Texas.

Q. Is that a pleasure craft? A. Yes, sir, it is.

Q. That is commonly called a yacht? A. Yes, sir, however at the time—well, yes, sir, at the time it was a pleasure craft.

Q. It was a pleasure craft? A. That's right.

Q. And you were a member of the crew? A. No, sir, I was Master.

Q: How large a crew was there in that vessel, sir? A. At the particular time, let's see, four.

Q. Four in the crew? A. Yes.

Q. Did that include or not include your own capacity? A. No, sir, I had two deckhands, a mate and an engineer.

Q. Now, then, that was about four months ago? A. Yes, sir.

390 Q. And for how long had you held that position as Master? A. About a week. May I explain that?

Q. Yes, sir. A. You see, in the course of my work as a surveyor, I also do vessel delivery; I hold forth to do it to any point in the world, and from time to time, I do just that. I deliver various vessels for various people to various ports.

Q. That is what you were doing as Master of this vessel? A. That's right.

Q. You made a delivery from whoever built it to Blessing, Texas? A. No, sir, I delivered it for the owner, from Houston to a point in the Colorado River.

Q. And that employment then lasted about a week? A. That's right.

Q. And you were Master of the vessel? A. Yes.

Q. Now, since then, you have not been Master, have you been actually employed as an officer on board a vessel? A. Yes, sir, the exact dates I couldn't tell you.

Q. That is since then, I mean? A. Yes.

Q. Now, then, you were not Captain, what was your position then? A. I was what was called a Night 391 Relief Officer on Steam Ship.

Q. Was that while the Steam Ship was— A. Alongside.

Q. Alongside the dock. That is the mate's watch? A. That's correct.

Q. And in that capacity, what mate were you? A. Well, you are not any mate. You are in charge of the vessel.

Q. Now, that is more or less a security watch, is it? Did you say it was a night watch? A. Yes.

Q. That is the watch that has part crew aboard to prevent fire and disaster and that sort of thing? A. That watch is to perform the same duty as the watch officer during the day.

Q. Except that the vessel was not on her way at any time during your watch? A. That's right.

Q. And for how long did that last? A. Well, I believe the last one about a week.

Q. And then before that, you had others? A. Yes, sir.

Q. Of that same general type? A. That's right.

392 Q. Now, in connection with that watch, or any of those watches, that was in the ship channel at Houston? A. Yes.

Q. With the boat along side of the dock? A. Yes, sir.

Q. You didn't manuever or have anything to do with handling the vessel? A. No navigation.

Q. No navigation whatsoever? A. That's correct.

Q. Now, then, before you were Captain of the Augusta, what was the next most recent employment that you had as Captain of a vessel? A. Now, that I think of it, I am not sure which one of these is first, but during the past four or five months, I also delivered a two-mast schooner from Galveston to Freeport and have made several trial trips with her in the Gulf since.

Q. That schooner is that—it is two-masted, is that a sailing vessel? A. It's a sailing vessel.

Q. It's a sailing vessel and it has auxiliary power? A. At the time, it had a small auxiliary engine, yes, sir.

Q. Now, what was the name of that vessel? A. Stella.

393 Q. And what was the hull length? A. Overall, forty-seven and one half feet.

Q. Forty-seven and a half feet. Now, you took that from Galveston to Freeport? A. Actually from Seabrook.

Q. Seabrook is in the Channel? A. Yes.

Q. That is the Yatch Club Basin in the Cannel? A. Shipyard.

Q. And it is a pleasure vessel? A. Yes.

Q. And you delivered that to Freeport? A. That's right.

Q. Now, before that, what was the vessel's name? A. Before that, I made a number of trips on the Augusta which at that time—now, this was in—June, between June and October, I made several trips.

Q. On the Augusta? A. On the Augusta, one from Houston to a place called Baffin Bay on the Texas Coast in from Corpus Christi, I believe, outside through the Gulf and back up to Houston, and then at the Green's Bay. Now, at that time, the Augusta was under charter as a

commercial vessel through the General Geophysical Company at Houston.

Q. Alright. And over all that period of time that you were engaged as Master there at sea would be 394 about how many weeks or days or months? A. Well, no weeks. It was about a forty-eight hour trip.

Q. About a forty-eight hour trip? A. Yes.

Q. And it had the same size crew then as it did? A. No, it had a much larger crew then. You see it was in commercial service and being used as a quarters boat.

Q. I see. A. And the exact number of crew, I just don't know.

Q. Now, then, before that, what were you Master of? A. Let's see. I suppose before that, I am not too clear on this; but I think the last one before that was the Albert E. Watts.

Q. Allright, describe that vessel for us, please. A. That was a 16,000 ton oil tanker.

Q. 16,000 ton oil tanker? A. Yes, sir, Sinclair Refining Company.

Q. Sinclair Refining Company? A. Yes, sir.

Q. You were the Master? A. Yes.

Q. Now, when was that? A. This was in 1951, I believe.

395 Q. In 1951? A. Yes.

Q. For how long were you—did you originally go aboard that vessel as Master? A. No, sir, I went on as Chief Officer.

Q. You were chief Officer? A. That's right.

Q. And how long did you serve altogether in various capacities on board the vessel? A. For a period of about eight weeks.

Q. About eight weeks? A. That's right.

Q. Now, then, you were Master when terminated your connection with the vessel? A. Yes.

Q. And where did that take place? A. Well, I joined the vessel in Corpus Christi, went from there to Marcus Hook, Pennsylvania.

Q. Now, wait a minute. Just where did you terminate, that was my question. A. In Houston.

Q. In Houston? A. Yes.

Q. And how long prior to termination, had you been Master of the vessel? A. I will say about five weeks.

396 Q. About five weeks? A. Yes, sir.

Q. And that was in 1951? A. I believe that's right.

Q. And from 1951 on down to date, you have described the other employment that you have had as Master of the vessel? A. As actual Master, yes, sir. Now, I couldn't, I don't believe, begin to describe in short time the other vessels I have been on.

Q. Well, the question was, as Master. A. That's right.

Q. Now, these watches that you stand there, are you in effect relieving—you don't sign articles? A. No.

Q. You do not permanently connect yourself with the ship when it comes in to Houston and you can of these man watches— A. Well, now, by permanent connection, I don't know whether we understand each other. The night relief officer does/exactly the same thing as the regular ship's officer including the keeping of the log book and all of the records, taking care of the cargo and just the same thing.

Q. You do the same thing; but you don't accept employment in that connection intending to remain with the 397 vessel after it leaves port? A. Oh, no.

Q. And your employment then is intended to be by you and by the ship temporary? A. Temporary, that's right.

Q. And while you are doing that, you are relieving or performing the work which a regular ship's officer would perform if he were available there? A. That's correct.

Q. Now, before the Watts, had you had regular employment as a Master, back of 1951? A. Yes, sir, from June 1950 until, I believe, June 1951, I was Master of the Motor Vessel, Captain Cotty, which was a Diesel Fire Boat owned by the Navigation District of Houston.

Q. Now, that is built pretty much like a tug, isn't it? A. Very much.

Q. Very much like a tug? A. That's right.

Q. What size hull? A. Eighty-seven feet, I believe.

Q. And the area, that is approximately the length of the Stephens, isn't it? A. If that is what the Stephens is.

Q. Alright, now, I am not sure whether we brought that out, but if the Stephens is seventy-nine and a 398 fraction feet long, why it is comparable in length to that? A. Yes, sir.

Q. Now, then, as Captain of the Fire Boat owned by the Navigation District, you were performing much the function as a Fire Engine would perform on land, weren't you?

A. That is approximately right.

Q. And you stay close in the ship channel? That was your station? A. Yes, our limits were within the Ship's Channel.

Q. No navigation in the Gulf? A. No, sir.

Q. Now, have you ever had any other experience as Captain on a vessel the size say of the Watts? A. No, sir, not in large steamers like that, no, sir. I have been officer in all capacities except Master.

Q. Now, at one time you were employed by Cravens-Darden, were you not? A. Yes, that is correct.

Q. And that was in Houston, Texas? A. Yes, sir.

Q. And that is a firm of Marine Insurance? A. Well, they are general insurance underwriters.

Q. Allright, now, then, for how long did you occupy that position? A. I was a Marine Underwriter for that 399 firm for approximately two years.

Q. What years were those? A. That was 1952 and 1953.

Q. Allright, when you left them, what did you do? A. I joined a local Insurance Agency in Houston.

Q. What was the name of that outfit? A. J. H. Blade & Company.

Q. Were they also engaged in Marine underwriting? A. Yes.

Q. How long did you remain there? A. For nearly a year. I am not just exactly sure.

Q. And after that, you were with an importer, weren't you? A. No, sir.

Q. Well, were you ever with an importer? A. No, sir. Q. Now, was that firm at one time, did it also, this firm of Blade, did it also at one time have your name on it, Blade & Young? A. No, sir.

Q. Now, then, you say that you have recently for about eight months been engaged as a— A. No, sir, I have had my own practice.

Q. You have had your own practice as an independent surveyor? That is correct, since I left Blade.

Q. I will ask you—during and before that time,

have you had occasion to appear as an expert witness?

A. Yes, sir.

Q. For Mr. Mandell? A. Yes, sir.

Q. On more than one occasion other than this occasion?

A. On two occasions.

Q. Two occasions other than this, and in what period of time? A. Oh, in a period of about four or five years.

Q. Now, then, back to the Stephens—I believe you testified that the aluminum construction of the super structure there, or any aluminum construction would corrode in contact with sea water? A. Well, no, sir, I didn't say any aluminum construction. I said that in my opinion, and in my experience and observation, I thought that aluminum would not stand up well and would corrode when exposed to sea water.

Q. Now, then, do you know whether aluminum is generally used in a ship's construction in the super-structure?

A. It has been my experience that it is not.

Q. Do you happen to know whether or not the Steam Ship, United States has aluminum construction in the super structure? A. I have never been aboard the 401 vessel.

Q. You don't know whether it does or does not? A. No, sir, I do not.

Q. Well, isn't it a fact that at this time the design used by the Navy in making P T Boats, that the hull is entirely made of aluminum both above and below the water? A. I am not familiar with Navy design, no, sir.

Q. You don't know whether that's true or not? A. No, sir.

Q. You have never been on the Stephens, have you? A. No, sir.

Q. You have never seen it? A. That is correct.

Q. And the model is the nearest thing to seeing it that you have had? A. That is right.

Q. Now, then, you have never operated a crew boat, an offshore drilling crew boat out here in the Gulf, have you? A. That's right, no, sir.

Q. Have you ever been on board one? A. I have been on several—on board several of them, yes, sir.

Q. By whom were those crew boats owned that you have been aboard? A. Let's see—I have been aboard

402 crew boats owned by C. G. Glasscock, and I have been aboard crew boats owned by—

Q. Now, where are those based, what is their home port?

A. At the time, the boats I was on, were in Corpus Christi.

Q. Corpus Christi? A. Yes, sir.

Q. Alright, now, what other crew boats? A. Boats that were owned by Casperi & Wendell in Rockport, Texas. Several boats, the owners of which I did not know—but I had been aboard them just to look.

Q. They were crew boats? A. Yes.

Q. You know there is a charter or contract crew boat, you know the difference. A. Yes, I know the difference.

Q. Are these vessels that you have been on, contract crew boats? A. Some of them were.

Q. Or are they drilling operation boats? A. The exact number I couldn't say, and from time to time, these boats owned by Casperi & Wendell, they are the actual owners. Sometimes they do the work under charter.

Q. Now, what size boat was the largest of these crew boats you have ever been on? A. I would say between seventy-five and eighty feet. Exactly, I couldn't tell you.

Q. You have never been on one any longer than eighty feet, have you? A. No, sir, I don't believe so.

Q. Now, the hull length makes a great deal of difference in Marine design, does it not, insofar as specifications and standards which are set up? A. Well, yes, sir, of course, the length of a vessel regardless—

Q. Well, I mean after a vessel gets to be so long, then if you make it any longer, you come under a new set of standards and specifications by inspection agency, don't you? A. Oh, you are referring possibly to the sixty-five foot rule?

Q. Well, that would be one example, yes, sir. A. That is one thing, yes, sir.

Q. Now, then; is there any classification as such for crew boats? Is that a separate classification of Marine vessels, carrying with it certain requirements with reference to size, equipment, tonage, motor power, crew? A. Yes, sir, now, do you mean under the law or—

Q. Well, first, under the law. A. I am not entirely familiar with the law, but I believe that is true.

Q. You believe there are crew boat classifications.

under the law? A. Now, for certain purposes—do you mean in general or for particular purposes?

Q. Well, I mean in general a crew boat classification, a classification of boats which applies only to crew boats. A. Well, there again, I have to say that to my knowledge, for example for purposes of license and certification of crews, I do know that a particular type of limited license is issued for use in working on vessels for oil companies, but further than that, I do not know.

Q. Now, that is what kind of license, issuing from where? A. Issued from the local Inspector of the Coast Guard.

Q. The American Board of Shipping is a standard classifying agency, isn't it? A. Yes, it is classified service.

Q. That is not a Government agency? A. I don't believe it is.

Q. Now, then, do you know of any classification that they have for crew boats? A. A particular classification?

Q. Yes, sir, one that we apply to boats of the size of the Stephens used in its capacity as a crew boat off shore. A.

Well, yes, sir, I know that there is such a thing as having the hulls classified, yes, sir.

405 Q. Well, now, what classification would that be in, in the American Bureau of Shipping? A. Well, not being an American Bureau man, I couldn't tell you. I would have their standards and the symbols that they use to tell.

Q. Well, now, that is the most frequently used standard of the boats comparison, is it not, the American Bureau in America? A. Well, I don't know. I don't believe, I understand you, I wouldn't just from the question.

Q. Are there standards and specifications, standards which are used generally in shipping in America? A. Yes, I think I see what you mean now, and the American Bureau does recommend and demand certain standards of construction and so forth.

Q. And their specifications and constructions are widely used in American shipping, are they not? A. Yes.

Q. Is there any other comparable standard than that? A. In this country?

Q. In this country. A. Not that I know of.

Q. So it is the exclusive one so far as you know? A. So far as I know.

406 Q. And you say you don't know anything about

their standards as applied to this type of boat? A. No, sir, that's right.

Q. Now, have you ever seen an aluminum cabin boat? A. Not that I know of.

Q. Have you ever made an inspection to determine what type of cabin, whether it was aluminum cabin boat or not? A. Yes.

Q. And you discovered that what you were looking at was not aluminum, is that right? A. Yes, anytime that I had occasion to need to know what kind of metal it was,—that's correct. I never did see any aluminum on them.

Q. Now, then, the Stephens is a twin-screw Diesel powered twin engined motor vessel, is it not? A. That's my understanding.

Q. Allright, sir, and if the Stephens has two five hundred horse power Diesel Marine engines, you have been on boats of that class? A. Yes.

Q. Is the Augusta pretty much like that? A. Yes, sir, approximately.

Q. Now, then, what is underway characteristics of such a boat as that with reference to whether the stern goes down and the hull up when they are underway at sea? A. Normally underway, a vessel will tend to have a drag, I would call it, the stern will be lower. In other words, the keel will be on an incline with the upper end forward.

Q. So when you are underway, fully underway, the stern goes down, gets down so to speak? A. Yes, sir, in calm water, that would be case.

Q. And correspondingly the bow comes out of the water more than it was before this took place? A. That's right.

Q. Sometimes you speak of getting off step in motor boating, don't you? A. I think so.

Q. Allright, and now, then, isn't it true that the design of the hull and particularly the bow makes a great deal of difference with reference to the bow waves created? A. That's right.

Q. And isn't it true that the Stephens, if it is built as the model there, is so designed as to slow the bow wave away from the vessel? A. Well, any pointed hull would tend to do that, yes, sir.

Q. And that is the tendency of that type vessel? A. Yes, sir.

Q. Now, then, of course you have never been on the Stephens, you have never been on the Stephens underway
and you have never been on the Stephens in this
408 identical weather we have been talking about? A.
No, sir.

Q. But this Coast Guard Weather Report and the Glenn Report,—the Coast Guard, I believe, said the weather was twenty-five to thirty knots or was it miles? A. It said miles per hour.

Q. Miles per hour. That is statute miles? A. Well, it didn't say, I don't believe.

Q. Well, that's slightly lower than knots, is it not? A.
Yes.

Q. Now, that means a knot, a nautical measurement is longer than a standard mile, is that correct? A. Yes.

Q. Now, then, according to your book on seamanship here, the Buford Table, that is a strong wind? A. That's right:

Q: Now, I will ask you this, if there was a hurricane in the Gulf approximately two hundred and fifty miles from this point at which the boat was operated. Now, isn't it true that—and you know as a Master, that when a hurricane exists at an area on the Gulf or ocean of very low pressure—isn't that true? A. That's correct.

Q. And while the winds of the hurricane are moving, in this hemisphere I believe they move counter clockwise,
409 wise, do they not? A. I believe so.

Mr. Mandell: We object, Your Honor. I have just looked at this report and I see no reference to any hurricane, it says a tropical storm.

Mr. Bolton: Well, I beg your pardon. I will rephrase it.

Mr. Mandell: There is quite a difference.

Mr. Bolton: I will ask him about a tropical storm.

Q. Is an incipient hurricane in the Gulf, is it not? It's a matter of degree whether you call it a hurricane or storm? A. It is a matter of degree, yes.

Q. Allright. And after you have a tropical storm, you have a low pressure area in the area of the tropical storm?

A. Generally; that is right.

Q. Well, isn't it always right, if your storm takes place where the low pressure is? A. Well, sir, it could be technically correct. There are two types of storms. There are the cyclonic type and the anti-cyclonic type, and the

other type, the anti, is a high pressure storm, but this probably was a low pressure storm.

Q. This was a low pressure, and at this time of the year, you have a good many of them in the Gulf, do you not? A. They occur frequently, yes, sir.

Q. Alright. Now, then, if you were in the center of that low pressure area—I'm not speaking of the winds in the disturbance itself which are more or less in a circular motion, are they not? A. Yes.

Q. But the other winds from all directions are coming toward the low pressure area, are they not? A. Yes.

Q. So if this tropical disturbance was located southwest of the point at which you as an observer were, the wind would be expected, as outlined here, to be from the northeast, it would be going toward the center of the disturbance, would it not? A. Well, I would say that would depend on the distance that you might be away from the center of the disturbance, but that is possible, yes.

Q. Alright. Certainly, I mean, then the area that is affected by the weather. A. That's possible.

Q. Alright, now, you had a twenty-five to thirty-five per hour mile wind as observed by the Coast Guard—you had a thirty to forty mile per hour wind as reconstructed by Glenn & Associates? A. Yes.

Q. And the direction of that wind was northeast, was it not? A. That's right.

Q. That means it came from the northeast? A. That's right.

Q. And so it was blowing toward the southwest? A. Yes.

Q. Now, then, if this vessel, Stephens, was traveling on the course, and I have here this hydrographic chart, Plaintiff's Exhibit No. 14—if your vessel was at Eugene Island Light at the point I indicate there on the map— A. All-right.

Q. And if it was proceeding to Beacon 7., the course as exactly as shown here, this is an exact hydrographic chart, the one they use in Maritime work? A. Yes, sir.

Q. Now, that course is approximately what? A. Southwest direction.

Q. I believe if you would put a projector on it, you would find it to be 212 degrees true. Now, that's about right, is it not? A. I expect it is.

Q. Now, that is generally southwest? A. That's
412 right.

Q. And your wind was a following wind while your boat was in that direction and headed that way, was it not? A. According to the report, that is right.

Q. According to the report. It was following you and the boat was moving out ahead of you. Now, that is a shallow water area, isn't it? A. That's right.

Q. And a twenty-five to thirty mile per hour wind is a good deal of wind, it's more than usual? A. It's a good stiff breeze.

Q. It is coming off of the land area? A. Yes.

Q. And the tide in all probability would be with the wind, wouldn't it? A. That's right, more than likely.

Q. Making it even more shallow than your chart indicates? A. Depending on the length of time the wind has been blowing?

Q. The amount of seas you would get is controlled to some degree, is it not, by the depth of the water? A. Yes, that's right.

Q. Now, then, the Glenn & Associates estimates on sea, as you read it there, said two to three feet wind wave from the northeast, and the next line says one to two foot 413 from the southeast? A. That's right.

Q. And you would take that to mean, would you not, that the two to three foot referred to the wind wave— A. That's right.

Q. And the one to two feet, to the swell? A. I believe so.

Q. Now, that isn't a very high sea, is it? A. No, it is not a tremendously high sea.

Q. And you get into the open water of the Gulf and it's a very ordinary type of sea, isn't it? A. It is.

Q. Now, the, in that type sea with your vessel—assume that it is traveling reasonably slow because of the amount of the wind and because of the shallow water that it is in, that would be what a vessel would ordinarily do if you didn't have any time element involved,—he was taking his ship out to his next point, isn't that right? He would be proceeding reasonably slow? A. Well, now, what do you mean by reasonably slow?

Q. I would say eight knots. A. Well, that suits me.

Q. Well, let's say eight knots. Let's say that eight knots is half speed ahead on this vessel. A. Allright.

Q. That's about right, isn't it? A. You know
414 more about that than I do.

Q. Well, I mean that's within reason on the speed of this kind of a craft, it is not a fast craft? A. Well, I would say—

Q. It might be speeded up to sixteen knots. A. That is a safe speed.

Q. Allright, let's say that we are proceeding half ahead and that would make about eight knots. A. Allright.

Q. We have got a following wind, we have got a two-foot sea from the northeast, wind driven, we have got a one foot swell from this— A. Uh huh.

Q. And that's the description in this weather forecast, isn't it? A. Yes.

Q. And the reconstruction? A. That's right.

Q. And this vessel has the characteristics we have described, while it is on its way, stern down, the bow gets up slightly and it rides in that direction. Let's assume that. A. We haven't discussed degree.

Q. No, not yet. We are not talking about degrees. A. Allright.

Q. Now, would you expect to find enough water, enough wave action to get any water at all over the
415 bow under those conditions? A. I would have to say that I couldn't answer the question without being there at the particular time. Now, under the conditions as described—

Q. Well, the answer is—
Mr. Mandell: Let him answer the question.

Mr. Bolton: I thought he had answered.
A. Under the conditions there described, there is a following sea more or less and a swell coming onto the port bow, is that right?

Q. Yes, on the port forward quarter. A. Well, allright, which could, of course, cause the vessel to find itself in what we call a confused sea, which could cause a motion like that. Now, a following sea makes most vessels, not being familiar with this particular boat, I couldn't say, but most vessels don't steer in a following sea as they do under most other conditions, so that would cause her to yaw a little bit too, and with a motion something like that, but

the actual degree of course, I couldn't say without being there.

Q. Well, now, this table is probably thirty inches high?
A. Yes.

Q. The ordinary length and height of a typewriter table? A. I would think so.

416 Q. And a two foot swell is something of that kind, that the wind-driven wave behind it and the one-foot sea which rolls in from the port quarter— A. Yes, sir.

Q. Is just half that? Q. Alright.
Q. And that is not a very high sea? A. It's not a very high sea. I said—

Q. You mean by that— A. That I follow you and that condition would cause rather than a regular sea motion, more of a peaked—

Q. You wouldn't expect to find then under those seas at all; even if you assume it is yawing—by yawing, you mean that the course is changing? A. The stern would swing around.

Q. You wouldn't expect to find that sea to be such as would cause a vessel of this class, this size, to take water over the bow every time it met any wave action at all? A. Well, not being familiar with the vessel, I just couldn't say. Each boat is different.

Q. Those are very benign seas ordinarily speaking, for the Gulf, aren't they? A. They are not large seas, that's right.

Q. Now, then, we used the term, "quarter": I would like to straighten that out, the line of mid-ship is called 417 what? A. Mid-ship. I see what you mean. In other words, the—

Q. Directly on the quarter, would be opposite to mid-ship line of the ship facing forward, would it not? A. Well, let me tell you how we look at it and then you can convert it into whatever you want to.

Q. Alright. A. Say we are standing in the center of the boat looking ahead—is of course straight ahead—looking astern is looking back dead of stern. This from anywhere from the center line on the stern around to about forty-five degrees out here would be in this case, on the starboard quarter.

Q. Starboard quarter? A. Then right on around and then at a right angle to the vessel would be a beam, and

then from there, from a beam on out from forty-five degrees would be on the bow, either bow as the case might be. That is the reason I said that it would be on the port bow, because that is the way we have been talking, expressing it. Quartering the vessel, it would be on the forward quarter, yes, sir.

Q. Would be on the forward quarter? A. Yes, sir, quarter, that's what it means.

Q. You put the vessel in quarter? A. That's right.

418 Q. You have described the direction with reference to that quarter? A. Yes, sir.

Q. You are not a metallurgist, are you? A. No, sir, I'm not.

Q. And you don't know what various aluminum alloys, or the characteristics of them are with reference to corrosion in sea water? A. From a metallurgical standpoint; no, sir.

Q. So you are not prepared to say what effect sea water had on this aluminum or upon this aluminum frame? A. On this particular aluminum?

Q. Yes, this particular aluminum. A. No, sir.

Q. Now, I believe you pointed out that in your opinion, that step would become incrusted with salt water if enough salt water got on there to cause it? A. That's right.

Q. And if that is the step and if it hasn't been treated otherwise, there is no such a condition apparent there though, is there? A. Well, I can't say that there is now.

Q. Well, now you could feel if the salt has formed there.

419 Do you know whether salt has any effect on this cast abrasive in here? A. Any effect on it?

Q. Well, any chemical effect. You don't know that, do you? A. No, I don't.

Q. Now, then, can you run your hand along that and feel any salt, or can you not? A. Well, now, salt, would feel more or less like this feels too.

Q. It would feel gritty, wouldn't it? A. It would feel just about like this feels itself.

Q. Now, then, on the aluminum tread, it is reasonably free from any grit? A. It appears to be, yes, sir.

Q. And it feels pretty much like this section over here which appears to be a section of the new step, does it not? A. It appears to be that way.

Q. There is not much discernable difference in the way these feel? A. Except that this one is smoother of course.

Q. I believe you said you are a member of the Association of Marine Architects? A. Yes, sir, that's right.

Q. Have you ever designed a ship of this class? A. Not of that particular size, no, sir.

420 Q. Or any larger than that? A. No.

Q. You haven't designed any as large? A. Yes, sir.

Q. But not of that type? A. Not of that size.

Q. And when is the last time you did any ship designing? A. I completed one last Friday.

Q. That is the architectural design on it? A. Yes, sir.

Q. What size craft was that? A. Forty-four feet and six inches.

Q. Was that a pleasure craft? A. Well, it is designed just as a—the hull is all I have gone into so far. It can be made into a pleasure craft or work boat or most any type.

Q. Now, good design, and such as any good naval architect, you or any other one, would dictate that the weight top side would be minimized if possible, isn't that true? You want to keep your weight topside as light as compared to the hull as you can? A. Well, that is going into stability problems and I don't believe that anybody could say that there is a hard and fast rule for any particular hull in that respect. The vessel must be stable, yes.

Q. And you want to prevent any tendency on the 421 vessel to fail to recover from a severe roll, do you not? A. That is true.

Q. In other words, you don't want it to capsize? A. That's true, certainly.

Q. And one of the factors in that is to keep the top side weight down as much as possible? A. Yes, that's right.

Q. And so in arriving at that result, you would use as light a material as is consistent with the service to be expected of the vessel? A. In general, that is true.

Q. Do you know what I am talking about when I say, the "G. M" of a vessel? A. Yes.

Q. What is that? A. Well, now, that is the—I don't know how to express it exactly, but it has to do with the metacentric height, metacentric gravity and general stability of the vessel.

Q. That is a matter which is determined in the design

of any vessel, is it not by the architect making the design? A. That's right.

Q. Now, then, do you know the G M of this type of vessel should be? A. No, I don't. Do you mean of this type vessel or this particular vessel?

422 Q. Well, of this particular vessel. A. No, sir.

Q. Well, of this type vessel? A. I couldn't say. I would have to answer that, no.

Q. In making a design of a vessel, how do you determine the G M of the vessel in the ship's design? A. How do I determine it?

Q. Yes. A. I determine it by means of—well, first I lay out my—do you want me to describe how I go through it from start to finish?

Q. No, sir; just what is required to do in determining that; what do you first determine as factors, not how you determine those factors. A. Well, it is determined by measurements basically of the hull itself.

Q. Measurements of the hull itself? A. Yes, sir, and you have to take, if you are going to do it properly, you have to take into consideration the weight of every single item that goes aboard or in the vessel, and you get all that data together, where you are going to place it in the vessel, where its permanent location is going to be, and you collect your data and figure it out on a piece of paper.

Q. Do you use that in the design of your vessels?

423 A. I have done it, yes, sir.

Q. You are not at the stage yet of this last design where you can do that, because you have only got the hull? A. No, this is just the hull which is ready now for building into anything that the prospective owner might want to make it.

Q. I believe that's all.

Re Direct Examination

By Mr. Mandell:

Q. Mr. Bolton asked you—I don't believe you got a chance to answer it, whether you served on large sea-going vessels, meaning eight or ten tons and over, in any other capacity besides Master. Oh, yes, sir.

Q: And in what capacity did you serve? A. I have served in every capacity on deck from deck boy up.

Q. Did you serve as Chief Mate? A. Yes, sir.

Q. And is it or not the duty of the Chief Mate aboard a sea-going vessel, that has charge of all the deck department and all the gears and all the port holes and ladders that lead up and down? A. That's true.

424 Q. And have you gained experience as to the need of proper port holes or proper gear, not only serving as deckhand, but actually as having the duty of Chief Mate aboard the vessel? A. Yes, sir.

Q. Mr. Bolton asked you if the seas were coming over on the port quarter, if they were coming over or hitting the side of the vessel on the port quarter, wouldn't that be just about the area or close to the area where those three windows are? A. Well, from the description of the course of the vessel, the direction of the wind, the direction of the sea and the direction of the swell, it is my impression that the swell would approach the vessel from approximately forty-five degrees on the bow, or in other words, forty-five degrees from right ahead.

Q. Again, if it came over the port quarter, and caused the sea to break against the hull, would it not do that? A. That's right.

Q. And what effect would that have on the sea? A. Well, in general when a sea hits against the side of the hull, if it is of sufficient force, it will break up and over.

425 Q. Cause a spray? A. Yes.

Q. And if it is close enough to the area of these three windows that we are talking about, why then of course that spray would hit right over those windows, wouldn't it? A. Yes, sir, it could do that.

Q. And especially will it do so or not, Captain, if the seas were in the state that you and Mr. Bolton discussed in your previous testimony, which caused the vessel to, I believe you gave testimony before— A. Yes, with roll and pitch.

Q. Which would cause the vessel to tip, so to speak? A. That's right.

Q. And bring the port holes closer to the spray than it would be if they sprayed on it? A. That is true. That would be closer to the surface of the water.

Q. Now, Captain, whether the port holes or the rims of the port holes surrounding the three windows or the three port holes we are talking about, were brass or aluminum, or what's the other metal that you mentioned? A. Bronze.

Q. Bronze. And regardless of what type of alloy or aluminum there was used, should such port holes and rims around them in the area that these particular port holes were, should they have any water coming through them? A. No, sir.

Recross Examination

By Mr. Bolton:

Q. Just one further question, Captain. Now, then, in our hypothetical case of the boat and the following wind, the wind at twenty-five and maybe as high as forty miles per hour, and the boat speed approximately eight, now, that following wind will blow spray in the direction of the wind, will it not? A. It probably would.

Q. And so under those kind of seas if you had any propeller spray, which is not at all uncommon, is it? A. Well, on this boat, it may be, I don't know.

Q. And such spray would be blown forward, wouldn't it, because the wind is coming from behind the boat, headed forward and about twenty-five to thirty miles per hour faster than the boat is moving through the water? A. Yes, that's right.

Q. So you would expect spray to come up on this area of the boat possibly into the well deck or cockpit? A. If there was any spray.

Q. If there was any spray? A. Yes.

427 Q. And the way with reference to the bow spray, as distinguished from the bow waves, the bow spray, that is the water after it is broken—that would be blown forward on the boat? A. Yes, sir.

Q. Or a part of it? A. Yes, in fact, if there was any spray coming from the vessel, coming from any part of the vessel all along the side, it would be blown—

Q. Blown forward? A. —forward against the boat, yes, sir, that's right.

Re Direct Examination

By Mr. Mandell:

Q. You say that spray would be coming from the side of the vessel? A. Well, I said if there was. Now, we, in our talking here, we have been talking about the seas and swells coming from this way. Well, of course they would not hit just under the windows. They would hit from the bow clear back.

Q. Therefore sprays would be coming over? A. Therefore if the wind was blowing from aft or from a little bit this way, which I believe it would if it was true northeast, it could be going all over the whole boat.

428. Mr. Mandell: We offer as PLAINTIFF'S EXHIBIT No. 35, Paragraph No. 1 through 8 of the Stipulations reading as follows:

PLAINTIFF'S EXHIBIT NO. 35

No. 90186-A

IN THE DISTRICT COURT OF
DALLAS COUNTY, TEXAS

134TH JUDICIAL DISTRICT

RICHARD McALLISTER

v.

MAGNOLIA PETROLEUM COMPANY

STIPULATIONS

To the Honorable Judge of Said Court:

It is stipulated and agreed by and between the parties that the following facts are true and correct and may be introduced in evidence by either party without prejudice to bringing in other evidence not inconsistent with these stipulations.

1.

That from February 2, 1949 until 8/19/53 plaintiff was employed as an engineer and a member of the crew on board the motor vessel J. C. Stephens.

429

2.

That at all times material, hereto the motor vessel J. C. STEPHENS was owned and operated by the defendant, magnolia petroleum company.

3.

That the motor vessel J. C. STEPHENS was used in transporting employees of Magnolia Petroleum Company and of other persons to and from Morgan City, Louisiana to drilling rigs, barges or crew located in the Gulf of Mexico.

4.

That at the time of his employment was terminated with Magnolia Petroleum Company the plaintiff was being paid wages at the rate of \$405.00 per month.

5.

That the last day plaintiff worked on board the J. C. STEPHENS was on July 3, 1953 and that all wages owing to plaintiff were paid to plaintiff, and plaintiff was additionally paid \$401.32 as sick benefits under a Company plan.

6.

That under the terms of employment of plaintiff he worked one week and then was off-duty for one week; that while on duty his meals and lodging were supplied 430 to him on board the J. C. STEPHENS.

7.

That the equivalent value of the meals and lodgin supplied to plaintiff for his on-duty days is agreed to be \$6.00 per day.

8.

That during his off-duty weeks neither lodging nor meals were available or furnished to McAllister.

Mr. Bolton: We offer as DEFENDANT'S EXHIBIT No. 7 Paragraphs 9 and 10 of the same stipulations, reading as follows:

DEFENDANT'S EXHIBIT NO. 7

9.

That the 27 photostated pages attached to the covering letter of September 4, 1953 from G. M. Kunkel, Medical Director of the U. S. Public Health Service Hospital at Galveston comprise the entire record of such hospital in connection with the treatment of Richard McAllister at such hospital. Plaintiff reserves right to make objections except as to

10k

That the letter from A. H. Glenn & Associates dated May 28, 1954 addressed to C. D. Conn, Magnolia Petroleum Company, may be introduced into evidence for the purpose of proving the facts stated therein.

MANDELL & WRIGHT

By

Attorneys for Plaintiff

FRANK C. BOLTON, Jr.,
Attorney for Defendant

432

STIPULATION

Mr. Mandell: We stipulate that the life of a man of the age of the Plaintiff, his life expectancy is thirty-six years. We further stipulate that Page 36 of this book I am holding in my hand, may be introduced in evidence and Plaintiff calls attention to the fact that on such page, the value of one dollar over a period of thirty-six years discounted at three per cent, would be 21,832. The whole page will go in evidence.

(WHEREUPON PLAINTIFF RESTED)

433 ERANK RIESS, a witness produced by the Defendant, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Bolton:

Q. State your name, please? A. Frank Riess.

Q. Where do you live, Mr. Riess? A. In New Orleans.

Q. What is your occupation, Captain? A. I am Vice President and Chief Engineer of the Equitable Equipment Company.

Q. And what business is the Equitable Equipment Company, what business does it conduct? A. The fabrication, design and construction of boats, barges, work boats, of various types, and general steel fabrication.

Q. What size boats does the Equitable Equipment Company fabricate? A. We begin with a vessel, small crew boat about twenty-eight to thirty-two feet and we will go all the way up to the limit of our building capacity, which is in the neighborhood of three hundred feet.

Q. And are you connected with that work of Equitable Equipment Company? A. Yes, sir, I am in charge of it.

Q. Allright. Now, how long have you been with Equitable Equipment Company? A. For seventeen years.

Q. Do you hold any degree or degrees? A. I am a graduate in a civil engineering course at Tulane University in Louisiana.

Q. In what year? A. 1936.

Q. And are you or not, a registered engineer in one or more fields in the State of Louisiana? A. I am a registered professional engineer in civil, mechanical and electrical engineering.

Q. Are you a member of any Marine or architectural societies? A. I have taken extension courses in Naval Architecture and I am a member of the Society of Naval Architects and Marine Engineers.

Q. And for how long have you been a member of such association? A. Five or six years, I guess, something like that.

Q. Now, I will ask you whether or not you are experienced with Equitable Equipment Company and generally, if you feel like you are familiar with the requirements of

a crew boat operating out from Morgan City, Louisiana.

A. Yes, sir, I would be familiar with those requirements.

435 Q. And has your Shipyard built such crew boats?

A. Crew boats of various types and among those, the particular type that is present here. As a matter of fact, we bid on that boat when it was constructed.

Q. And were you not familiar with the project the Magnolia had of buying and building that boat, or constructing that boat before it was built? A. Yes, I know Mr. Fletcher who was the Naval architect. I have a great deal of respect for him, and I did a little bit of work on the hull with him.

Q. And that was at the time the design was being made?

A. Yes, sir.

Q. Are you familiar with the boat itself? Have you been on the boat? A. I have been aboard the boat, yes, sir.

Q. Generally within what size limits of lengths of hull are crew boats of this type constructed? A. Generally the practice is to stop them somewhere in the neighborhood of sixty-five feet.

Q. And do you know of any crew boats in the Gulf, any larger or as large as the Stephens? A. Yes, the practice now is--after the Stephens was built and she has been in service a number of years--the crew boats are getting larger, until recently they have produced two or three steel

boats which are approximately the same size as the 436 Stephens, they have only been in use, I should judge, six or eight months.

Q. And was that a result of the experience gained, you think, by the Stephens? A. When we prepared our bids on these various other boats, we were guided basically by the--and I had checked it myself--basically by the performance of the Stephens in her use.

Q. And do you know what the Stephens cost, was when built, the contract cost? A. In the neighborhood of \$130,000.00, as I recall.

Q. And as I understood your testimony, you bid on it, but you were not the low bidder? A. We were not the low bidder.

Q. Do you know where the Stephens was built? A. At Wills-Stedden Shipyards in Maryland.

Q. And do you know in what year the Stephens was

built? A. Oh, I imagine—I would judge about 1950 or 1951, somewhere along there, no, about 1948 or 1949.

Q. Now, then, at the time the Stephens was built, I believe you said it was a new design for crew boat class, didn't you, it was the first of its size? A. That is correct.

Q. Is the design of the Stephens such as to make it a seaworthy craft for use as a crew boat in the Morgan 437 City area?

Mr. Mandell: We object to that if it please the Court. That calls for a conclusion.

The Court: I sustain the objection.

Q. Mr. Bolton: Do you know what the particular features are of design are which go to make for the crew boat class such as is the Stephens? A. I should say that the design of a crew boat like that, a good run to the wheel, fine bow, flare in the bow to make it a reasonably dry boat, sufficient power, minimum displacements for the usage intended and maximum speed for the horse power installed.

Q. Does the Stephens have such qualifications? A. Yes, sir, I would say so.

Q. Specifically with reference to the Stephens itself, you have examined and been aboard and have examined the design of the ladder or steps which lead from the crew's lounge to the galley, have you not? A. I have.

Q. Is or not that design in keeping with standard Marine design? A. I would say it was above the average.

Q. Now, then, specifically with reference to the construction, you have also inspected that, have you not, or 438 that phase of it? A. Yes.

Q. Is that or not, constructed according to your standards of Marine construction? A. Yes, sir; that would be entirely adequate for the use intended.

Q. Now, then, I exhibit to you a step which has been mounted a board and marked Defendant's Exhibit No. 2, and I call your attention to the long step there, tread, and I will ask you whether or not you are familiar with that type of step used in Naval vessels or Marine vessels. A. Yes, I did some research on this particular step, particular type of step.

Q. Is or is not this step used in Marine vessels? A. Yes.

Q. And is or is not this step used in Navy vessels? A. Yes, sir.

Q. Is or is not this step used in Navy vessels? A. It is.

Q. Does this step meet Navy vessel specifications? A. It does.

Q. I hand you an aluminum plate which has been marked Defendant's Exhibit No. 18 and ask you to tell the jury what that is. A. This is a checked aluminum floor plate used on the decks or platforms of various types of boats.

439 Q. Is that also sometimes used in step construction? A. Yes, you can flange it and use it as a step.

Q. Do you have an opinion as to which of the steps construction is a better step for use in crew boats. A. I should prefer the abrasive tread.

Q. And what is the reason for that opinion? A. Because of the fact that the friction between the sole of the shoe would be increased by the abrasive material in the tread itself.

Q. Now, do you happen to know, in your business, or do you know which would be the most expensive construction of the step? A. I would assume that the abrasive type would cost more.

OFFERS IN EVIDENCE

Q. We offer DEFENDANT'S EXHIBIT No. 18. You have been on the Stephens, and you see the model here. Is that a reasonably good model of the Stephens? A. I should say it was an excellent model.

Q. Are you familiar with the window construction of the windows which are located in the super-structure alongside the port side of the Stephens forward? A. Yes, by inspection.

Q. We now offer as DEFENDANT'S EXHIBIT No. 19, a drawing, and I will let the witness identify it. Mr. Riess, can you look at Defendant's Exhibit No. 19, there and state what it depicts? A. This is typical of the windows used in the port side of the Stephens, approximately 440 in the area of the companion way.

Q. Allright. We offer it in evidence.

Mr. Mandell: No objection.

Q. Mr. Bolton: We are looking at Defendant's Exhibit No. 19. I will ask you what this drawing in this general area, which is on the lefthand side of the Exhibit, is. A. That's an elevation of the window itself indicating the

glass, and the frame of the window, showing the position of the dogs which tighten it down on its gasket and showing the hinges on the top side of the window, which you use to open the window.

Q. Alright. Now, then, there is also a view appearing on the righthand side of this Exhibit, is there not? A. Yes, sir.

Q. Now, what does that depict? A. A section taken through the window showing the hinges, the gasket, the method of installing the gasket and the method that the frame is pinched down into the frame and also shows the glass itself, the glass of the window.

Q. Alright, now, taking from the top of this last drawing, the drawing on the righthand side, I point there to this top circle that appears, or partial circle, and ask 441 you what that depicts. A. That is the hinge.

Q. And now this long area which is labeled, "glass" is or not that the pane? A. That is the glass itself.

Q. And those L shaped lines connected to each other, one inside, what do they depict? A. That is the frame of the window, one being the main frame and the other being the retainer frame to hold the glass.

Q. Now, then, look at it there; which is the outside of that window? A. The outside of the window is in this direction.

Q. In other words, the water from the sea hitting that window would come from the extreme righthand side of the — looking at the exhibit, it would be from the right to the left? A. It would move from right to left.

Q. Now, then, the high portion of this, these vertical lines inside there, what does that depict? A. That is the size of the house of the boat itself.

Q. That is the hull itself of the boat? A. That is the side of the cabin.

Q. Side of the cabin? A. Side of the super-structure, it is not a part of the direct hull.

442 Q. It is the side of the super-structure? A. Yes.

Q. And that is the part above the main deck? A. Above the main deck, yes, sir.

Q. Now, then, there is a hatch area with an arrow leading up from the words "of rubber seal". What does that

depict? A. That is a gasket in the retainer frame itself that the window pinches onto.

Q. Is there a light gasket below? A. Yes, sir.

Q. And is that depicted by this other hatch area? A. In the same way.

Q. Where are the dogs with reference to that area? In other words, how do you put pressure to it? A. The dogs are arranged with tumble bolts and they are notched on the dogs at these points where they show, and by tightening down, you can increase the pressure of this frame onto the rubber gasket. You can actually pinch this frame into the gasket itself or into the seal itself.

Q. This gasket is in what shape? A. It is completely around the frame.

Q. Completely around the frame? It is rectangular? A. It matches up to the frame.

Q. It matches up to the frame and there are no breaks in the gaskets? A. There were none apparent. I saw no breaks in the gasket.

Mr. Mandell: If it please the Court, if the witness is testifying just from this drawing, that is alright, but if he is going to testify as to what he found—

Mr. Bolton: I will withdraw that.

Mr. Mandell: I wish the Court to instruct the jury to disregard it.

Mr. Bolton: Alright. I will agree to that.

The Court: Alright, gentlemen, you will disregard that. Let's proceed, gentlemen.

Q. Mr. Bolton: Now, there is another gasket shown on this drawing, is there not? A. Yes, sir.

Q. And that is at two places on the drawing? A. Yes.

Q. What gasket is that and what does it serve to do?

A. That is the seal gasket which prevent any water that conceivably would get in this area from encroaching around the edge of the glass and thereby getting inside of the boat.

Q. That is water which comes from the outside, goes down and under the glass and up around the facing?

Q. A. Down through the frame, under and into the boat, or on the side around the frame and into the boat.

Q. What is the shape of that gasket? A. It follows the sequence of the frame itself and it continues in a rectangular shape around the window.

Q. Now, then, how many dogs are there? A. A dog here—two at the side and two on the bottom.

Q. There is no dog at the top? A. The tendency is to pinch down, as you begin to tighten, they begin to tighten and impinge on the gasket if they are correctly adjusted.

Q. Now, this represents the location of the hinge pin on the window design? A. Those are the blades and the pin.

Q. Now, then, is that standard or good standard Marine window design? A. Yes.

Q. And that is the design of these three windows? A. While the dimensions may vary, basically the design remains the same.

Q. Now, does that design result in a water tight window? A. To all intents and purposes providing the window is kept in good shape, it would.

Q. With this type of window, the windows and 445 ports can be opened? A. Yes.

Q. Now, then, will opening and closing those windows affect the seal or water-tightness of it? A. No, unless the window were left closed a sufficient length of time that it would pull part of the gasket away. If they were opened and closed regularly as they should have been, in a tight boat, there would have been no possible damage to that gasket.

Q. If one of those windows is not at any time opened, will that affect the seal of it, of that design? A. Well, that would serve to make it even more water tight, as you begin to accumulate foreign bodies in there, and tends to keep it even tighter.

Q. Now, then, Mr. Riess, the evidence here has been that the window frame of those particular windows on the Stephens are constructed of aluminum. Is that a material used in Marine construction for this type of boat? A. Yes, it is used extensively.

Q. Do you, of your own knowledge, know of aluminum hull construction? A. Yes, I know of two P.T. boats which were built up at Annapolis Shipyard which were built completely of aluminum, the hulls, super-structure and everything.

Q. I will ask you whether or not you know what construction is used, what material is used in the super-structure of the United States Steam Ship, the United 446 States? A. Well, apparently a great deal of alu-

minum was used there. It is widely advertised on television and in magazines.

Mr. Mandell: Now, if it please the Court, we object to that answer unless the witness knows of his own knowledge, and ask the Court to instruct the jury to disregard it.

The Court: I sustain the object, and the jury is instructed to disregard the answer of the witness.

Q. Mr. Bolton: Now, then; do you know of any shipyard in the New Orleans area which uses aluminum in the super-structure of boats of this general class? A. Yes, there were a number of boats built in the New Orleans area with complete aluminum super-structure and were used as crew boats.

Q. Now, then, can you tell me what shipyard did that? And about when that construction was made. A. Avondale Marine Works, about three or four years ago.

Q. And do they still use aluminum super-structure, do you know? A. I don't think they ever discontinued it. They have completed building a series of boats and so far as I know, they are still usable, still in services.

Q. Have you in your Equitable Equipment Company used aluminum in the super-structure of any 447 boats? A. Yes, we have. We have used aluminum.

We used aluminum topside the hatches and we used aluminum for types of floor plating, everywhere we can use aluminum, we do so as a practice in order to reduce topside weight.

Q. Were there or not any boats of this general use built by Creole, used by Creole? A. Yes, they built smaller boats, but they are crew boats. They are around forty-five to fifty-five feet long.

Q. And are they used as crew boats in Venezuela? A. They are used as crew boats in Venezuela.

Mr. Mandell: It isn't show that this gentleman has seen those boats used in Venezuela, and I object to that unless it is shown that this witness knows what type of water and whereabouts.

The Court: Objection is overruled.

Mr. Mandell: Note our exception.

Q. Mr. Bolton: Have you answered, Mr. Riess? A. Yes, I do know. As a matter of fact, I have seen boats built by Avondale that were used in the coastal waters around

in Louisiana that have aluminum super-structure, complete aluminum super-structure.

Q. And were you interested in observing that from the standpoint of your own use and design? A. Yes, we wanted to adapt that. We bid on those boats also.

448 We were not successful. We were fairly familiar with all of the details.

Q. When were you last on the Stephens? A. It was approximately in November of 1954.

Q. And did you on that occasion go down with me on board the Stephens? A. We spent the day together, yes, sir.

Q. And on that occasion, did you pay particular attention to the space in the galley on the port side, the ladder, the windows in that area? A. Yes, I even made a sketch of it.

Q. You made your sketch, did you make measurements with reference to the Stephens? A. I measured everything, yes, sir.

Q. Now, then, I will ask you, first, with reference to the location of the two windows out here which I will call galley windows as distinguished from passageway windows, did you pay particular attention to the location of the two galley windows? A. Yes, I have them located in my mind quite definitely.

Q. Alright, now, did you also pay particular attention to and locate the stairway which was adjacent, or which led from the lounge to the galley? A. Yes, sir.

449 Q. Where are those window generally, with reference to that stairway? A. The galley windows are forward of the top of the stairway and the stairway window is over the platform on the port side, the platform being the final access to the stairway leading from the lounge down to the galley.

Q. Did you or not on that occasion, observe whether or not there was located a water pan or drip pan underneath and below the galley window? A. Yes.

Q. I have in my hand, Plaintiff's Exhibit 9. I will ask you if that is or is not, the drip pan that I point to there? A. That is the drip pan.

Q. Now, then, what in Marine design is the purpose of that? A. To catch any possible water that might come through the window and to provide a place for the accumu-

lation of water and to provide a channel for the dispersal of water.

Q. Did that drip pan meet those designed specifications?
A. It had all of the qualities required.

Q. Now, then, at the time you examined the drip pan, was it wet or dry? A. It was dry.

Q. From your examination and measurements there, what was the furthest aft or back portion of the drip pan with reference to the stairway? A. At the bulkhead 450 leading, which is at the bottom of the stairway. This is the transverse bulkhead athwartship on the boat, and the drip pan ended approximately at that point.

Q. By transverse, what do you mean? A. Transverse means athwart, athwartship running a beam—across the beam of the vessel itself.

Q. Athwartship is in that direction? A. It is in that direction, yes.

Q. And that's that bulkhead. It runs athwartship? A. Yes, sir.

Q. Did you examine this drip pan with particular reference to determine whether or not water would—if water accumulated in the drip pan and leaked from the drip pan, whether such water would reach the top step of that ladder? A. In my opinion, that would be impossible.

Q. Did you examine it with that particularity in mind? A. Yes.

Q. And it is your opinion that it would be impossible? A. It is impossible. It can't get back there. It would be very difficult, no, impossible.

Q. Why do you say it's impossible? A. Well, it would have to—to begin with, the boat underway, even if it was going slow as in this particular case, it was in shallow water, and it would have had to trim from the bow 451 back toward the stern.

Q. Would that be with the bow slightly elevated? A. Yes, the bow would have been elevated, and the stern would have been down, sucked down by reason of operating in shallow water—the water would have had to come back this way. It has been said that there was dum dum piled up inside here which would have curveyed the water up. The rolling and pitching of the boat would have tended to throw the water sideways, which would have meant that to get any water back here on this step, that water would

have had to come back, it would have had to go up, it would have had to go athwartship and it would have had then to turn ninety degrees and be blown back on the top step. I say that is impossible by reason of the fact that this door was open—

Q. This door that you are talking about is the door into the engineroom? A. That is the door into the engineroom, the natural draft would be down these steps.

Q. So in your opinion, it is impossible that any water from that drip pan could have under any circumstances other than tracking— A. That is correct.

Q. Did you pay particular attention to the condition of the passageway window, that we have called it? A. 452 Yes, sir, the passageway window is designed without a drip lip inside. There is a scupper outside which would allow any water accumulating between the glass and the frame to bleed back out onto the deck.

Q. And that deck is the weather deck? A. That is the weather deck.

Q. Outside? A. Yes, sir.

Q. No drip-pan inside? A. None inside.

Q. With means for water to drip itself back outside? A. The water shed on that window was to the outside of the boat, not to the inside.

Q. Now, then, right at this point, is or is not the cabin of the super-structure of the Stephens narrower at the top than it is at the bottom? A. Yes, she has a tumble home.

Q. A tumble pump? A. A tumble home, they call that, that is flared in.

Q. That means that the bulkhead on any point along this cabin or superstructure is of itself at any angle from the vertical? A. That's right, it is inclined inboard.

Q. Inclined inboard. Now, then, if water had gotten inside this window and did not come out through 453 this scupper as you have described, would the water have run down a bulkhead which ran away from the step or would it have run down a bulkhead running toward the step? A. It would have had a tendency to follow the bulkhead itself down which was not exactly adjacent to the steps.

Q. Now, then, on that occasion, did you examine the seal around these windows? A. I tested the seals.

Q. First did you examine them? A. I examined the seals.

Q. Did you examine the window frames themselves?
A. Yes.

Mr. Mandell: If the Court please, we object, the condition of the seals and the windows in November 1954 is irrelevant and immaterial as to what happened on October 19th, 1950.

The Court: I think that is a question of credibility. I will overrule the objection.

Mr. Mandell: Note our exception.

Q. Mr. Bolton: What was the condition of those windows at that time? A. They were all very good.

Q. And were those window frames of aluminum? A. Yes, sir.

454 Q. And were there any cracks or breaks in the frames? A. No sir.

Q. Were the gaskets in proper position? A. The gaskets were, yes.

Q. Now, you also made a water test on those windows, did you not, at that time? A. Yes, sir, we made a hose test by direct impingement on the windows themselves.

Q. What did you use to get water? A. We used the hose.

Mr. Mandell: If the Court please, we make the same objection as to what test was given at that time, and not shown that the same conditions existed. It is immaterial and irrelevant and highly prejudicial to the Plaintiff.

The Court: Well, what conditions exist now and what conditions existed back there is all a question of credibility. Now, for the purpose of these tests that have been made, I will overrule the objection. You may go into the question of credibility on cross examination.

Mr. Mandell: Note our exception.

Q. Mr. Bolton: Now, did you conduct this direct impingement test—when you did that, what did you have as a source of water supply? A. We used the hose off the dock.

455 Q. What size hose was it? A. Oh, I would say it was about a one inch water hose tied into the dock proper.

Q. Tied into the fresh water facet on the dock? A. Yes, sir; fresh water from the dock.

Q. What kind of a head of water did you have when you turned it on? A. The water pressure was approximately thirty pounds per square inch.

Q. Now, then, with water through that hose at thirty pounds per square inch, was there or was there not, a solid flow of water from that hose? A. Yes, we had to hold the hose very close because the ship was moored starboard side too, and all the place we had to hold the hose was right on the outside deck about five or six inches away from that window, going full strength.

Mr. Mandell: If Your Honor please, may be have a continuing objection going to all of what was done on this test?

The Court: You may have your exception.

Q. Mr. Bolton: You mean the boat was moored starboard side too; which was this side here? A. Yes, that's right.

Q. The windows that you were testing were on 456 the port side? A. Yes, sir.

Q. So you couldn't step further away from that window than the edge of the deck itself without stepping in the water, is that correct? A. That is correct, yes, sir.

Q. So you stood on the deck with your hose directed—
A. Full stream against the window.

Q. Full stream against the window? A. That is correct.

Q. Now, then, did you test all of the windows in that manner? A. Yes, sir.

Q. Now, what happened when you tested the two galley windows? A. The two galley windows indicated a very very small amount of seepage through one corner.

Q. Do you remember what corner that was? A. It was the forward corner, as I recall it.

Q. Of each of the windows? A. Yes.

Q. Was it the upper or the lower corner? A. It was the lower corner.

Q. It was the lower corner, that would be the corner that I am pointing to here? A. Yes.

457 Q. Now, you say a very small amount of seepage, can you describe the amount of water that got through — how long did you hold that hose on there? A. We tested — oh, I would say we had the hose on the window for approximately three quarters of an hour to an hour.

Q. That's altogether? A. Altogether, yes.

Q. And were testing one window after another? A. Yes, sir.

Q. Now, then, after you had tested each of these windows, did you observe the result inside? A. Well, we were inside and we were outside. We observed outside and then went back inside and took a look at what had happened.

Q. And while you were inside, did you or not have somebody playing the hose from the outside on the window? A. Yes, sir.

Q. Now, you say you got a small amount of seepage on these two forward windows, can you give an idea of the amount of water, say a cup? A. It was less than that. It was very minute.

Q. And that was after you had applied the hose on those windows, approximately fifteen minutes to each window?

A. Gave them a full test.

458 Q. Did they leak in any other respect than you have described here? A. No, sir.

Q. Now, then, let's talk about the water test on the passageway window, what did you do there? A. The same test was conducted both from the outside and observation made from the inside, and the same approximate result was noted. There was a certain small seepage of water came in through one corner of the window. Q. What corner was that? A. That was the forward corner.

Q. Was it the upper or lower? A. It was the lower forward corner, as the other one.

Q. Allright, now, then, in terms of cup, or half-cup how much water got through that window in that fifteen minutes? A. It wasn't measurable in that quantity at all. It was very minute.

Q. Allright. Did you then observe that water after it got inside? A. Yes, sir, we observed the course of the water.

Q. What happened to the water? A. Down the bulkhead and onto the floor, down through the door—we never did pick up any sign of it down below. We never could, there wasn't enough.

459 Q. Allright, now, then, I will ask you first in testing that window, after you had played the hose for enough time to determine whether you were getting any

leak or not at any particular point, you did not thereafter leave the hose there, did you?

Q. Now, then, did you give it what you considered a full test at each point in trying to determine whether there was any leakage? A. Yes, sir, I would say that that test would have been very satisfactory. It was much more severe than spray conditions.

Q. Now, then, in order to get the water to leak into the forward lower corner of the window, what position was the hose required to be held at? A. It had to be held from aft, actually impinging on the window itself at the point where the seepage took place.

Q. Do you mean that the hose mouth itself was held right up against the window pane and the entire discharge from the hose permitted to strike that particular point? A. In the corner.

Q. In the corner. A. It was held at some little distance away, but not more than maybe a foot or two feet, something like that, when it hit that point.

460 Q. And that was the only corner which showed any leakage? A. Yes, sir.

Q. And that was not immeasurable quantities? A. No, sir.

Q. That was after your test of several minutes? A. Yes, sir.

Q. Now, then, at the conclusion of that test, was there any measurable water on the top step of the ladder? A. No, there was no water on the top step.

Q. Did you also observe in the construction of that boat whether or not did you observe it for the particular purpose of determining whether or not the water could possibly leak from the wheelhouse deck onto the top step of the ladder below? A. No, there would have been no possibility. That all seemed to be tight and right up to shape. There were no signs of it. There were no streaks, no corrosion, no rust.

Mr. Mandell: If the Court please, may we have our same objection and exception?

The Court: You may.

Q. Mr. Bolton: Isn't it true that the deck of the wheelhouse does not overhang that ladder in any respect at all? A. That is correct. There is an open stair well there. The wheel house is inboard from that.

see from this report what time during October 19th was a sightseeing party taken on this boat. A. We got to town on that day at 0-8:30 and we stood by from that time until 16:30.

Q. What time was that? A. That was four-thirty.

Q. In the afternoon? A. Yes.

Q. Allright; go head. A. And we picked—well,
337 at that time, we picked up this sightseeing party
and we departed from Magnolia Slip at 16:30 and
went to Eugene Island.

Q. Then the sightseeing party as such did not come in
on board ~~until~~ four o'clock that afternoon? A. Yes, sir;
that is the time we departed with them that afternoon.

Q. And of course they came in shortly before that, I suppose? A. Yes, sir.

Q. And there was no sightseeing party and no other people except the employees of the Magnolia Petroleum Company before or during the time that you received your injury on the early morning of October 19th, 1950? A. No, sir.

Q. They were all employees? A. They were all employees, yes, sir.

Q. Now, then, in reply to Mr. Bolton's questions, you discussed the larger window, which I think has been placed immediately above these steps on which you slipped. Did you yourself have occasion, before you were injured to work on that window to attempt to stop the leaks from it?

A. Well, sir, actually to say work on it, I guess—

Q. Well, what did you do? A. Well, we put this what we call dundum, it is a plastic base of caulking compound.

I inspected the windows. The corrosion or the elec-
338 trolysis of the aluminum—

Q. Just a moment. I believe you said that you did put caulking compound around it? A. Yes, sir.

Q. Why did you do that? A. To try to stop it from leaking..

Q. Before you put the caulking compound around it, on more than one occasion, did you have occasion to look and observe how the gaskets fitted around the windows? A. Yes, sir, I inspected all of those port holes at one time or another.

Q. Speaking particularly of the larger window immediately above those steps? A. Yes, sir.

Q. Did you have occasion to look and see the condition of that gasket around there sometime before you were injured? A. Yes, sir.

Q. What did you find that condition to be of the gasket? A. Well, it was pushed out. It just wasn't in line. It wasn't straight.

Q. Did the gasket fit the plate properly? A. No, sir.

Q. From the time that you first discovered that condition until the day you were injured, did the gaskets around that larger window fit properly so as to keep the water out? A. No, sir.

339 Q. Tell this jury, Mr. McAllister, whether from your own observation, from what you have seen, from what window or windows did you yourself see sea water coming in and landing on that first step from which you slipped and fell. A. On those three on the port side, the two small ones and the larger one right above and aft of those two.

Q. At my request, did you attempt to determine exactly the time that you worked after leaving the Magnolia Petroleum Company until this date? A. I don't believe I understood your question.

Q. From the time you last left or were laid off at the Magnolia Petroleum Company until this date, you did do some work, did you not? A. Yes, sir.

Q. Did you at my request attempt to determine the number of weeks and the places that you worked and the amount of money that you made? A. Yes, sir.

Q. And will you please tell the jury what that is? A. As near as my wife and I could figure it up, I worked six weeks for Brookside Memorial Park Cemetery. I made three hundred and seventy-five dollars and five cents. I worked four weeks for John Landry & Company, I 340 made two hundred and sixty-five dollars and fifty cents. I had to lay off a week there that I didn't get paid for, and I worked one week for the Houston Museum of Fine Arts and I made seventy-eight dollars and four cents.

Q. Is that the extent of your entire earnings that you had from the time that you were laid off at the Magnolia Petroleum Company until this date? A. Yes, sir.

Q. Didn't you, at Mr. Bolton's request, submit yourself

to an examination by a Dallas doctor? A. Yes, sir, I was examined by Dr. Butte, here in Dallas.

Q. That was last Thursday? A. Yes, I believe so.

Q. And do you recall when you went back to Galveston some time in January, 1954, attempting to get more treatment? A. Yes, sir.

Q. At that time, did you tell them that you were doing some work for that cemetery place? A. Yes, sir, I told them I had been working, yes.

Q. And did they give you any treatment? A. No, sir, they told me I had changed my occupation and I wasn't qualified or I couldn't get no more treatment there.

Q. Now, Mr. McAllister, when you went back to the Magnolia Petroleum Company in order to try to resume work in August after you were discharged from the Marine Hospital, were you physically able to stand the type of work that you were supposed to do? A. I went back and tried it, but I just couldn't take it.

Q. I believe you testified that you married in 1948? A. Yes.

Q. And the lady back there is your wife? A. Yes, sir.

Q. And those are your two children? A. Yes, sir.

Re Cross Examination

By Mr. Bolton:

Q. Mr. McAllister, when you went to Morgan City after you were discharged from the Marine Hospital fit for duty— A. Yes, sir.

Q. Did you take your family back with you? A. Yes, sir.

Q. Now, when you went back to the Marine Hospital in January, or rather when you left the Marine Hospital in August of 1953, I believe you testified yesterday that by the time you did that, you had employed an attorney, is that not right? A. I talked to him, yes, sir.

Q. And the day following your discharge in Galveston, you appeared and underwent an examination in Dr. Brodsky's office in Houston at the suggestion of Mr. Mandell? A. Yes, sir.

Q. Now, then, isn't it a fact that you had no intention at all of continuing your work for the Magnolia Petroleum Company at the time you went back in August of 1953?

A. No, sir, that was not my intention at all. I tried to work.

Q. Now, then, you have given us a number of figures as to the earnings, is that the earnings, or is that what you actually received less the withholding tax? A. That is everything I earned, yes, sir.

Q. Is that what your earnings were or is that what your checks were? A. No, sir, that was everything.

Q. That's everything. Alright. Now, then, as I understood you just a minute ago, your testimony is that you saw on October the 19th, 1950, the day that you fell, and before you fell, water coming in on the top step of the ladder and that that water came from all three of the ports, is that right? A. Yes, sir.

Q. Now, then, where were you when you observed that condition? A. When I saw the water leaking, you 343 mean, sir?

Q. When you saw the water leaking in on the top step? A. Well, I could see it as I would go up and down the passageway.

Q. Did you make a special note of it,—I mean, do you remember this particular day and this particular water, and this was before you fell? A. Yes, it was a common thing.

Q. I understand that you say that, but what I mean is, on this particular day, is it your testimony that you observed water leaking in around all three of those port holes and that some of that water coming from all three of the port holes, you saw get on the top step of the ladder? A. From this lid below the port holes is where the water would come from onto the steps.

Q. Now, by the lid below—did you say lid or lip? A. Lip, l-i-p.

Q. I have called that a drip pan, is that what you are talking about? A. Yes.

Q. That is the same thing? A. Yes.

Q. And that is where the water came from, is that right? A. Yes.

Q. Now, then, that drip pan is a closed container 344 except it has no top on it, isn't that right? A. Yes, sir.

Q. Now, what is it which closes the after end of that pan? A. I believe it is the bulkhead, sir, up and down.

Q. I've got here Plaintiff's Exhibit No. 9. I will ask you to look at it and point out—it shows that pan, does it not? A. Yes, sir.

Q. Now, is that the pan—this is the after end of it and it runs—and you can't see a little piece of it because of the beam—you see it again and you come over and then you can see it goes off of the picture, that's what we are talking about, isn't it? A. Yes, sir, that's the same pan.

Q. Now, then, the question I had was—I believe you said it is a bulkhead which furnishes the aft enclosure of that pan? A. Yes, sir.

Q. And that is this bulkhead that goes up and down vertically, is that right? A. Yes.

Q. And that shows there—that is inset a matter of an inch or two from the front of that, the bulkhead extends out an inch or two beyond the front of the pan at that point, does it not? A. At that point, that's right.

Q. Alright, now, at that point also, that bulkhead strikes about the 1, 2, 3, 4, 5th step down. You can't see the 5th step? A. 5th or 6th step.

Q. 5th, or 6th step down. Now, those steps we decided yesterday and can see here vaguely are six inches wide, are they not? A. Yes, sir.

Q. So you had either four full steps or four and a part full steps behind the bulkhead? Here's six inches, twelve inches, eighteen inches, and one we can't see there, then twenty-four inches? A. Yes, sir.

Q. At least that much, isn't it? A. Yes, sir.

Q. So the actual space that we are talking about getting wet from this pan up here lies at least, the front end of this, is at least twenty-four inches behind, further aft on the boat than this bulkhead which furnishes one of the walls of the drip pan, isn't that right? A. Yes, sir.

Q. Now, then, you saw the water come out of that pan and get on the top step? A. It would splash out as the boat would roll and pitch.

Q. Now, the boat was rolling and pitching? A. Yes, sir, the boat was rolling when—

Q. When you saw it, when you saw the water splash out, the boat was rolling and pitching? A. Yes, sir.

Q. The boat standing still won't splash any water out, will it? A. No, sir.

Q. And there won't be any water in that pan when the boat is standing still for as long as eight or ten hours, is that correct? A. Yes, sir, I would think there would be.

Q. Well, do you know whether the water remains in that pan for that long or does it drain out? A. It will eventually drain out, yes, sir.

Q. Alright, now, the boat on that morning had been tied up alongside the Magnolia Inn from six-thirty in the evening until 0400, hadn't it, the next morning? A. Yes, sir, I believe so.

Q. Now, then, during that period of time, you hadn't seen any water splash on it, had you? A. Not while we were tied up, no, sir.

Q. Alright. Now, then, you observed this thing. Was there water in that pan when you started out the 347 next morning? A. I didn't inspect it.

Q. Your testimony is that you don't know whether there was or there was not water in the pan at the time you commenced your run out to the Beacon Seven marker? A. No, sir; at the time of departure, I didn't.

Q. Now, then, you were in the engineroom part of that run, weren't you? A. Yes, sir.

Q. And did you see during that run out there, water in that pan? A. I didn't inspect it, sir. No, sir.

Q. Well, your answer is that you then did not personally see it because you didn't look for it? A. I saw it, as I would go down, the water would come out of it, yes, sir.

Q. Well, you did see water then in the pan on the run out from Magnolia Inn to Beacon Light Seven? A. Yes, sir.

Q. Alright, now, that pan is considerably higher than eye level standing on the deck of the galley, isn't it? A. Yes, sir, it's quite a bit.

Q. In fact, can you reach up as high as that pan easily? A. Not from the deck, now, sir.

Q. Not from the deck, you can't even reach it? A. No, sir.

348 Q. So you couldn't see any water while you were in the galley deck unless it was splashing out? A. That is right.

Q. Alright, now, when you stood on the stairway, can you look over into that pan? A. When you step in there to go down the ladder, you can see in that trough.

Q. You kind of have to look a little around the corner to see the end of it toward you, is that right? A. Up the closest end, yes, sir.

Q. The closest end is blocked from view by the bulkhead, isn't it? A. Yes, sir.

Q. Alright, now, then, when was it that you first saw water in that pan that morning? A. Well, sir, I couldn't say just when, anytime that I had an occasion to go up and down that ladder I could see the water coming out of the pan.

Q. Now, you don't think there was any water there when you first cast off and the boat had been lying at the dock moored for a matter of eight or ten hours? A. There could have been water there, yes, sir. I didn't personally inspect it.

Q. You didn't inspect it so you didn't see any water there? A. No, sir, not before we left.

349 Q. Alright, and you cast off and immediately came down to your engineroom? A. After we got under way, yes, sir.

Q. And that was immediately, wasn't it? A. Well, I would say immediately, within a few minutes after we cast off, I generally make up my lines that I cast off.

Q. Alright. Well, within a matter of a minute or two, you started down there—three minutes, four minutes, something like that? A. I would say at least within five minutes I was going down there.

Q. Now, then, yesterday I believe that we talked about how many trips up and down that you made, and you said that as near as you could remember on that occasion, there were only two, is that right? A. Well, I made at least that many and I could have made more.

Q. Well, do you think you did make more? A. I wouldn't say so. I don't remember.

Q. Well, if you observed this condition when you were on the step, it was even on that first time or it was when you attempted to go down the second time, or during some other trip which you don't have any definite recollection of? A. Yes, sir,—Judge, may I stand up?

The Court: You may.

Q. Mr. Bolton: Go ahead and stand there a minute. That's alright.

Now, when the water splashed, how much water would

splash, as near as you can tell, a gallon, a quart, a cup, or give me some measure of it, a teaspoon? What's your best judgment? A. Oh, I would say as it would come out, a half cup or a cup at a time would come out and splash over and as the boat would roll, the water would go to the front and then as the bow would come up, it would come to the back and splash out.

Q. Allright, now, when it would come to the back, with that kind of motion the water would roll down, would it stay in the trough until it got to the bulkhead? A. We put some dum dum in there in the back part of that trough and it sloped it up in an attempt to stop that water from coming in.

Q. You had done that yourself before this event? A. No, sir, the Captain had.

Q. Well, you had seen him do it and you know it was done before this date? A. Yes, sir.

Q. So you had sloped the end of the after bulkhead, the one that furnishes the closure at the aft side of 351 the trough? A. Yes.

Q. With dum dum. What would that do to the water? A. Well, actually it didn't do any good. It didn't stop it. When this water would come up, it would run up that slope and then come out of it.

Q. Well, the motion of the water then would have been up the slope—some of it would have turned back into the pan, wouldn't it? Most of it, in fact, would have stayed in the pan, wouldn't it? A. Yes, I would say the biggest share of it did. It wouldn't empty it at the time.

Q. And some of it would splash back forward, is that right? A. Some of it—it would come inward from the pan and down.

Q. Well, if it came inboard and down, where would most of it hit? A. On the steps, and run off.

Q. Which step? A. From top to bottom.

Q. It got all the steps wet? A. Yes, sir.

Q. Well, now, when that condition was existing, a man walking up and down that ladder needed a rain coat or something to keep him from getting wet, is that 352 right? A. I have got water on me from that, yes, sir.

Q. Well, did you get water on you that morning from

that, if you know? A. Well, I wouldn't say for sure whether I did or not.

Q. Now, then, if you got a half cup of water on you at a time, that's a pretty good amount of water at one time, if you have just got on work clothes, no weather protection, isn't it? A. Yes, sir.

Q. And you still think though that is how much would come out of there? A. That much and less. Every time that it would roll it wouldn't be the same amount come out, no, sir.

Q. Well, would it come out as a kind of a spray? A. Well, not exactly a spray, no, sir. The water would come out, that's the only way I can explain it to you.

Q. Well, was it more of a solid course of water than a spray? A. Well, It would be like a drop of water, a good sized drop of water would hit you, you would know if it hit you.

Q. Well, did it come out in drops, rather than in a solid stream of water—it was broken into drops when it hit you, is that right? A. Well, it would be like—I believe you

termed it like coming out of a garden hose, a solid stream of water. It was like if someone would take and throw water at you from a cup, it wouldn't all hit you as a solid body, but you would know that water had hit you.

Q. Alright. Now, did that water come out in a curved motion? A. I don't believe I understand you.

Q. Well, what I am getting at is, since this bulkhead has about a two inch or some sort of measurement about like that, clearance here, all the way up and down from the front of that—now, then, the water, in order to get two feet back to this step, would it come out and get on this portion, the outboard portion of the first step, or would it come out and get on the inboard portion or the middle, where would it get? A. I seen it come from this pan and hit this bulkhead over here and run down.

Q. Now, that's the opposite bulkhead across the passageway from—making an inboard bulkhead of the ladder space? A. Yes, I seen it come from there and go across and hit this bulkhead.

Q. Have you also seen it hit the port ship bulkhead, the one that runs crosswise to the ship, this one that I have my pointer on here, the one that's got this electrical

354 fixture on it. Would it hit it, too? A. No, sir, if it would come out, it would go past it.

Q. Past it forward or aft? A. Going across the boat.

Q. Now, this bulkhead here is as far aft as this bulkhead on the opposite side of the ladder, they are in line, aren't they? A. Yes, sir.

Q. And you say it went past that bulkhead, do you mean it went forward of the bulkhead? A. Forward?

Q. This direction up here is forward. This table is forward of the ladder, isn't it? A. Yes, sir.

Q. Now, you say it went past that bulkhead, and by that you mean it went forward of the bulkhead? A. It would hit the deck—this bulkhead is the same as at this window, or approximately, we will say the same. I don't know if it is exactly the same.

Q. It is the same as this aft, or the second window or the middle window? A. Yes, sir.

Q. Alright. A. The water would come out with the roll of the boat, that would throw the water out. The water would naturally fall on over, it wouldn't come out 355 and fall just straight down.

Q. It would fall, mostly then, on the deck of the galley, wouldn't it? A. On the deck and this bulkhead and the ladder.

Q. Alright, now, there is a scupper in the galley deck somewhere near the landing of this ladder, isn't there? A. I believe it is right in front of my engineroom hatch here, because it drains into my engineroom bilge.

Q. And that scupper is a draining cup or drain pipe that leads down into the bilges? A. Yes, sir.

Q. And would most of the water that splashed out there go down that way and go down through the bilges? A. What water the deck would accumulate would run out, yes, sir.

Q. Now, then, you said that you saw water from all three of the windows on that occasion? A. Yes, sir.

Q. Leaking onto the top step? A. Yes.

Q. I am just asking you now. We are only going to talk about the top step. That is what you told Mr. Mandell, is it not? A. Yes, sir.

356 Q. Alright, and you said, I believe, that you had not done what you might call work, but you had put

some plastic putty or dum dum around the third window aft, didn't you? A. Yes.

Q. I believe you called it the big window, the one that is in the passageway there? A. Yes, sir; around the bottom of it where it was leaking.

Q. Now, did you do that before the occasion of your fall? A. Yes, sir, I have.

Q. Alright, and did that make any difference, did it slow down or retard or stop water immediately after you had gotten through caulking it? A. No, sir, that compound didn't stick so good to that paint. It didn't do much good.

Q. Well, would it do good even temporarily until the compound came off? It would stick some, wouldn't it? A. Yes, sir.

Q. And then it would come off? A. Yes, sir, when the water would hit it, the weight of the water on it would seem to—it would turn loose.

Q. Now, describe for me the course, just how that water that came in, what portion of the window it came in, and after it got in, just where it went, and its trail and its trip down to the top step. A. It was coming in 357 around the window. There is a little ledge underneath it.

Q. Is there any particular part of the window it came in around, the upper righthand corner, the lower righthand corner or where? A. I would say it came through the bottom portion of the window.

Q. Did it come in around the glass? A. No, sir.

Q. The glass in the frame? A. No, sir, not around the frame, between the gasket and the window, sir.

Q. Now, that gasket that we are talking about, is the gasket—the window is hinged, is it not? A. To the top, yes, sir.

Q. At the top. And there is a neoprene rubber gasket there and the window is in a frame? A. Yes, sir.

Q. And this frame fits down into another opening or outer frame, what do you call that? A. It fits down on a gasket. The gasket is in a sort of a trench.

Q. Alright, the gasket is fixed into the hull itself? A. Yes, sir.

358 Q. In a trench? A. Yes, sir.

Q. And this window frame which is hitched at the top—

A. Yes, sir.

Q. Fits up against the rubber gasket in a trench which is built into the hull of the ship? A. Yes, sir.

Q. Will you mark this as Defendant's Exhibit 6.? I will ask you to look at this. Now, that is a picture of the window we are talking about, taken from inside the ship, is it not? A. Yes, sir.

Q. That shows the inside, the endboard side of that window? A. It looks to be the same one, yes, sir.

Q. Alright. Now, then, this is not one of the windows with a drip pan or a pan around it, this is the window that is in the corridor, isn't that right? A. Yes, sir.

Q. Now, then, the hinges that we are talking about are up at the top of the picture, and there is one on either side? A. Yes, sir.

Q. And of course the windows are closed and you cannot see the gasket? A. That's right.

Q. Now, the window is kept tight or is designed to
359 be kept tight by what we call dogs? A. Yes, sir.

Q. And I have my pointer there on one dog, don't I? A. Yes, sir.

Q. And here is another dog? A. Yes, sir.

Q. Now, is this also a dog? A. There are two on either side.

Q. So there are one, two, three, four, five, six dogs? A. And two hinges.

Q. And two hinges, and those dogs are eye bolts are bolts with nuts on them that machine wrench will fit and a washer. Is it a lock washer? A. No, sir, flat washer.

Q. It is a flat washer that you tighten down on them in order to bring that dog tight against it and to bring the movable frame tight against the gasket? A. Yes, sir.

Q. Alright, now, then, while we are looking here, point out if you will, where it was that you saw the water coming in on that window on that date. A. Along the bottom edge.

Q. Along the bottom edge below the pane, is that right, below the glass? A. Yes, between the frame and the bulkhead.

Q. Between the frame and the bulkhead? A. Yes,
360 sir.

Q. Alright. A. I have never observed the water

coming in from the top and over it. I would be along the sides and the bottom.

Q. Alright, now, then, that water then after it got down there, where did it go? Where did you see it go?

With the motion of the boat—now, the motion you have illustrated there is a pitching motion there. It is down and up and down and up— A. Yes, sir.

Q. It is not a roll, is it? A. Well, the boat rolls and pitches at the same time.

Q. But the motion that you have made with the picture there was a pitching motion, wasn't it? A. Yes, sir.

Q. And that water— A. And that water, it comes from below the window on this little ledge here.

Q. Alright. A. And you can see it there, as the boat rolls, it will roll from one side to the other of that trough and as the boat will roll, it rolls off down onto this platform and down the ladder.

Q. Well, it is not any real trough, it is just a ledge?

A. Yes.

361 Q. It doesn't have any edge on it? A. No lips on it, no, sir.

Q. And it will roll down the bulkhead? A. Yes, sir.

Q. And then where does it get when it gets to the next obstruction coming down, the next thing that it strikes? By the way, what direction is that bulkhead slanting right there, is it straight up and down? Is this bulkhead straight up and down or is it at an angle? A. I couldn't say off-hand.

Q. Alright, I will ask you to look at the model here and ask you if it doesn't appear that this cabin is slightly wider at the bottom of the cabin than it is at the top? A. Yes, sir.

Q. That's the way the boat is, isn't it? A. Yes, sir.

Q. And this bulkhead we are talking about is the bulkhead just below this window here, so the slant would be outboard at that point, it would not be a vertical bulkhead, would it? A. Well, sir, I remember that cabin as being more straight up and down. I don't remember that slant to it. It is possible that it is, but as I say, I don't remember it being built that way.

Q. Alright, your recollection is that it is a ver-
362 tical bulkhead? A. Yes.

Q. And isn't wider in the cabin at the bottom at deck level than it is at the top, is that your best recollection? A. Yes, sir.

Q. Now, then, describe the water going down the bulkhead and where it got to when it next reached some kind of obstruction. A. There was no more obstruction. It ran down the bulkhead on this platform before you get to the ladder and ran down.

Q. Now, the platform which you are talking about is an extension of the deck itself, it is the main deck of the ship, isn't it, at that level? A. I would have to look at it.

Q. I have here in my hand, Plaintiff's Exhibit No. 8. That shows the area you are talking about, you can look carefully up here and see the dog on that window? A. Yes.

Q. The window we are talking about, and here is your handrail and here is your top step? A. Yes.

Q. Now, then, coming down that bulkhead, what happens to the water? A. Well, it would hit this deck here 363 and run down the steps onto the galley floor.

Q. Allright. Now, it first comes to a ledge there that appears to be about two inches wide? A. Yes.

Q. That is just an extension of the deck or the platform you step off of, made out of the same kind of material? A. Yes, sir.

Q. Diamond plate aluminum? A. Diamond plated aluminum.

Q. And just above that is another seam of some kind, that is the seam that joins the cabin to the— A. To the weather deck:

Q. To the weather deck, isn't it? A. I believe so.

Q. Allright, now, then, this water on that day—if you will trace it the best you can—show me on the picture where it came from. A. I would have to have the rest of window, sir.

Q. Well, can you tell me on the model? No, you can't because the window comes off. I show you Plaintiff's Exhibit No. 9. We are now talking about Plaintiff's Exhibit No. 9, excuse me. Now, you can see the large window up here? A. Yes.

Q. This is the one up here we are talking about? 364 A. Yes, sir.

Q. And this is the bulkhead? A. Yes, sir.

Q. And you think it probably is straight up-and-down,

but are not sure? A. The inside of it where this handrail is, I am quite sure it is straight up and down.

Q. This then is a vertical bulkhead as you remember it? A. As I remember it, yes.

Q. Now, then, trace the course of the water, where did it come from? A. From this ledge without a lip.

Q. Allright. A. It would run down at no particular place that it would run off of this ledge.

Q. Allright. A. But the biggest part of it would run off as the water would run from end to end.

Q. Allright. A. And down and corner and down.

Q. And then were you able to see water or traces of water at each corner of the window down the bulkhead? A. More so than at the rest of it. The biggest portion would be there.

Q. Most of it would be at the corner of the window
365 and it would run down the bulkhead? A. Yes, sir.

Q. Was that a regular trickle of water that you could see there? A. Yes.

Q. And that's what you did see there that day? A. Yes, sir.

Q. The water was coming in and it wasn't a drop here and a drop there, but it was a thin stream down the bulkhead, is that the way it was? A. Yes, sir. It won't run straight. Water will make its course.

Q. It wasn't a heavy enough stream to make it run straight down, it would follow little indentations or something else on the bulkhead, make a kind of crooked stream, follow the bulkhead all the way down, is that right? A. Well, what I mean to say, sir, is that at one time, it would run off. It might take a path going aft, and the next time it would run off, it might take a path going forward.

Q. Allright. A. It would not just run straight down the bulkhead as it would come off this ledge.

Q. Now, then, you saw that water there that day? A. Yes, sir, I've seen it any number of days.

366 Q. Well, I am talking about that particular day. A. Yes.

Q. And you saw that water there that day before you had your fall? A. Yes, sir.

Q. And you knew it was there? A. Yes, sir.

Q. I believe you said, and I may not have understood you correctly, I want to be sure, that that was of the three

windows that we are talking about, the window that is over the landing leaks less than the other two? A. The one that is over the landing?

Q. Yes, sir. A. Well, what would make it leak less, what caught in that trough, would be forward. Well, it had a collecting point. This here, it would run off as it would come in.

Q. That's not the amount of leakage. I mean did it allow this water per window—that's one way to say it—water coming in around this big window as we have called it, regardless of what happened to it, did it come in as much around it as it did around these other two windows? A. No, sir, I didn't have as much trouble with that one as we did with the two forward ones.

Q. And would it come in, would you say, half as much, or can you give me an idea about comparing the two
367 amounts that came in around the window? A. Well,
I never did just sit there and watch them to see which one leaked the most.

Q. You watched them that morning, leak, didn't you? A. I saw the water as I would go through there. I could see the water coming in, sir.

368 E. H. YOUNG, a witness produced by the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Mandell:

Q. State your name, please. A. My name is E. H. Young.

Q. What is your occupation? A. I am a Marine Surveyor.

Q. What license, if any, do you hold from the U. S. Coast Guard as an American Seaman? A. I hold a license as Master and pilot of the Panama Canal and adjacent waters, and also a license as Master Unlimited for American Vessels for any water and any tonnage.

Q. In the ocean? A. Yes, sir.

Q. Where were you born? A. I was born right here in Dallas.

Q. And where do you now live? A. I live in Houston.

Q. And you served as a Master on various vessels? A. Yes, sir.

Q. Except for the fact that this bulkhead does not extend out to this door frame or bulkhead athwartship, does this pretty well represent the construction of that portion of the J. C. Stephens? A. It is represented. There is a companionway from this lounge deck down to the galley, and a companionway from the galley up to the pilot house.

Q. Now, there is no communication; is there, between the space occupied by the companionway leading up to the pilot house, and the space occupied by the companionway leading down to the galley? A. No, sir, there are bulkheads and sills intervening.

Q. Alright, now, the sills, we call the combing? A. Yes.

Q. Is that the same thing? A. Yes, sir.

Q. Is there or not a scupper located at the lounge deck level in the landing at the foot of the ladder from the wheelhouse deck—from the passage—from the wheelhouse deck to the deck below? A. Yes, sir.

Q. Is or not that scupper of adequate size and design to take care of any water that you think might come there?

A. Yes, sir, it would be.

462. Would it possible for water from the wheelhouse deck to flow down the ladder leading from the wheelhouse to the lounge below and get in any way at all upon the ladder leading from the main deck or the lounge deck to the galley? A. It couldn't be unless the water attained a very great depth there on those various platforms which would be impossible.

Q. Do you not have an opinion as to whether any water could possibly under any circumstances get from the wheelhouse deck onto the step of the ladder below except by being tracked there? A. Well, you could track it in, and if the conditions were bad enough on those windows you might accumulate some water, which would be impossible, but other than that, I can't think of any way to get a fair amount of water under that platform and onto those steps there.

Q. And by fair amount of water, you mean water enough to completely wet the step or be visible on the step? A. Water enough to completely wet the step.

Q. Now, then, did you also make an inspection to determine the location of the various appliances, cables, engines and that type of thing, anything using grease or oil?

A. Yes, we looked below in the engineroom and in the galley room above.

463 Q. Is there any source of oil or grease in the passageway leading from the lounge deck to the galley?

Mr. Mandell: May we have our same objection and exception?

The Court: You may.

Mr. Mandell: Thank you.

A. There is no source of oil or grease that would have gotten onto that companionway.

Q. Mr. Bolton: In the companionway itself?

A. In the companionway itself.

Q. Now, then, there is, of course, oil in the engine room?

A. Oh, yes.

Q. But there is no communication between the engine room and the space there; is there? A. Other than being tracked to that point, no.

Q. No direct communication? A. No openings, no direct communication.

Q. In your opinion, is it possible for there to have been any grease or oil on the ladder or any portion thereof, except such as might have been tracked or dropped by persons passing up and down? A. That's the only way that I can see.

Q. Have you or not operated boats of this general type?

A. Yes, sir, I have.

Q. And can you tell by the design of a boat whether 464 or not generally the way the wave action is going to be? A. Yes, you can, and it is possible to judge to some extent and in a preliminary way by observing the hull form of the vessel itself.

Q. Does this correctly reflect the hull form of the vessel? A. Yes, sir.

Q. Now, then, do you have a term flare in connection with the bow of a vessel? A. Yes, sir, to make a vessel dry and to attempt to shed a spray, there is built into this boat and any other relatively high speed vessel, a fine bow with flare up to the deck, which means that you increase rapidly to the beam on the deck, the idea being that any amount of water that forms in the bow ways when she plows into a chop or into a sea, when that water goes up, it is thrown upward and outward away from the boat rather than straight up in the air.

Q. Would that be the motion? A. Yes, and you can see, and you can follow the contour of the vessel's bow.

Q. Now, by a fine bow, what do you mean? A. That means that the angle of the bow lines running off from the center line are at a minimum angle rather than being blunt, which gives you an easier motion through the water and economizes on horse power.

465 Q. Would I say a sharp prow, would that be the same thing? A. Yes, it is the same thing. The fineness of line is another definition of the same thing.

Q. Now, does this boat have a flare, or does it not have flare? A. It has flare and fine bow line, and also has very fine free board to forward which will put you up out of the water.

Q. Now, by fine freeboard, that is what? A. It is the distance from the low water line of the vessel to the weather deck.

Q. In other words, somewhere along the hull is where the water is at load level, will be reached? A. That is correct.

Q. Now, above that, anything that is subject to the wind action is called freeboard, is that not right? A. That is freeboard. Above that up to the main deck is the freeboard of the vessel.

Q. So the area from the loadline to the main deck, and I have my finger on the main deck, is the freeboard? A. That is the freeboard of a vessel.

Q. Now, how much freeboard or approximately how much freeboard if you know, does the Stephens have? A. The Stephens has approximately six feet forward and I should say about slightly less than four feet aft.

466 Q. By that you mean it is from the point on the main deck forward near the bow to the water level, is approximately six feet? A. Yes, sir.

Q. And to a lesser degree approximately four feet at the stern? A. Yes, sir.

Q. Now, then, are you familiar with waters around Morgan City, Louisiana? A. Yes, sir.

Q. Have you ever you ever been out to Eugené Island Light? A. Yes, sir.

Q. And to Beacon No. 7? A. Yes, sir.

Q. Now, do you know how the Stephens acts when it is underway, say with reference to the tilt, I believe you tes-

tified about it. A. Yes, she has a drag by the stern and an elevation by the bow, which is normal in any vessel, because of the fact that the running lines are brought up in the direction of the wheel from amid-ship.

Q. Now, the wheel that you are talking about, is what I would call the propeller? A. Yes, sir, the propeller.

Q. And there are twin wheels, twin propellers on 467 this craft? A. Yes,

Q. And they are located in the area of my hand here, is that right? A. That is right. Well, one of them is located under the boat and the other one on the opposite side, approximately midway between the keel and the outboard edge of the vessel itself.

Q. Now, the keel is this line upon which I have my hand? A. Yes, sir.

Q. That is the location of the wheel on the Stephens? A. Yes, the rudder is aft of the wheel.

Q. And the rudder is the steering mechanism, and that is aft of the wheel? A. Yes, sir.

Q. Now, do you know approximately the size of the wheel? A. No, sir, I don't recall that figure.

Q. Well, would it be three or four feet or something like that? A. Well, I would say maybe thirty-six inches, maybe as much as thirty-eight inches.

Q. Somewhere in the neighborhood of three feet? A. Yes, sir.

Q. And there are two of them? A. Yes.

Q. And they revolve on shafts from the two 468 engines located in the engineroom of the boat? A. That is right.

Q. And there is a reduction gear in the mechanism? A. Yes, there is a reduction gear on the 500 horse power engine that turns the wheel, the wheels are outboard turned.

Q. Now, then, because of the location of the wheel and because of the design of the boat, when the Stephens is underway, you get a slight tilt in this manner, will you not? A. Yes, sir.

Q. And that will raise the amount of freeboard forward and would lower the amount of freeboard aft while you are underway, isn't that correct?

Mr. Mandell: We object to that, Your Honor, as leading and suggestive.

The Court: Sustain the objection with reference to leading.

Q. Mr. Bolton: Well, state then, if you will, the effect of the motion of the Stephens in the water with reference to the freeboard area falling down? A. As the vessel begins to move, the wheels move water from under the hull and they have a tendency to drag the stern of the vessel slightly with a corresponding increase or elevation in the bow as you begin to get underway. Now, 469 that would be especially accentuated if you were operating in shallow water, or if you were operating at high speed.

Q. Now, then, do you know approximately how much water the Stephens draws to keep from going aground? A. I think she would have to be in about five feet of water.

Q. And that, of course, is the amount of water necessary to give your wheels clearance to turn? A. That's right. Well, it wouldn't operate very efficiently in that draft.

Q. You need deeper water? A. You ought to have a minimum of ten feet, I would say, in order to prevent excessive drag.

Q. Now, I have here Plaintiff's Exhibit No. 14, I believe it is, which is a hydrographic chart of the area around the mouth of the Atchafalaya River, is that what this is, do you know that? A. Yes, here is the Atchafalaya Sound and there is the river going back up that way.

Q. Now, you have been in that area? A. Yes, sir:

Q. Can you tell on the chart there, the approximate depth of the water out around Eugene Island? A. It shows there as being 5-1-4-7, and these are on this particular chart, either in fathoms or feet above the mean 470 low water.

Q. Can you look at it and see if it is in fathoms or feet? A. Yes, it is in feet.

Q. A fathom is a measurement of Marine— A. Six feet is a fathom, yes.

Q. Now, I believe you said that the depths were what? A. Well, that mark right here is 5, 10, 6, 5 and so forth all the way back up into the bay.

Q. And that is not within the channel itself, or is it? A. No, in the channel itself, they are marked 10, 11, 8. I would say you would get around ten feet.

Q. Around ten feet of water in the channel? A. As I recall that channel, yes, sir.

Q. Now, what is that situation out to Beacon Light itself, is it approximately the same? A. It is approximately the same, the channel is maintained at about the same depth.

Q. Now, how about the water around the channel? A. The water around the channel gets to be shoals and a little bit less than the channel depth itself.

Q. Now, then, do you know the course the boat would take proceeding from Eugène Island Light to Beacon No. 7? A. She would be traveling southwest.

Q. Would that be—approximately in that direction, of course, would that be approximately 212 degrees true? A. I would have to look it up.

Q. West of south? A. Yes, it would be west of south about 212 degrees.

Q. You did that by reading your protractor over here? A. Yes.

Q. That's the compass there? A. Yes.

Q. Alright, now, then, if the Stephens, or a boat just like it, was operating with these weather conditions, wind from the northeast thirty to forty miles per hour—would you prefer to illustrate this on the blackboard, would it be easier for you? A. I could probably do it clearer.

Q. Would you step around here, then? to the blackboard? A. Yes, sir.

Q. Would you on that blackboard show the course of the ship's movement from Eugene Island to Beacon Light No. 7; now what is this? A. That is the vessel.

Q. The vessel itself? A. The bow, the top about here approximately on a course 212 degrees true coming in a southwesterly direction.

Q. Now, if on this voyage, the wind was thirty to forty miles per hour out of the northeast— A. That would 472 be the direction of the wind—this is the vessel.

Q. And if the seas on that occasion, were two to three foot wind waves from the northeast, that represents what? A. These represent the crest of the waves.

Q. The crest of the waves? A. Yes.

Q. If there were a one to two foot swell, from the southeast, and if the boat were proceeding at approximately eight miles or knots per hour, either one, and that boat had

the bow design of the Stephens, do you have an opinion as to whether or not on that run under those weather conditions as I have given you there, there would be any water from the sea reaching the super-structure at the point of the three windows on the port side? A. It would be very difficult to get water on the port side of the vessel under those conditions.

Q. Why do you say that? A. The wind and the wind waves themselves are two to three feet and being offshore, the intervals between them are relatively short, that is a chop. Those will get underneath the transom of the vessel and cause the vessel to pitch.

Q. Now, the transom is the stern? A. The transom is the stern of the vessel, yes. It will cause the vessel 473 to pitch on its longitudinal action. A swell is spaced far greater than a chop; and a ground swell is sometimes eighty to one hundred feet between the crest, maybe only one or two feet high.

Q. Yes, sir. A. Which would cause a slight roll. So that at the time the vessel was moving, it was probably moving with a slight movement up and down and a small roll from port to starboard. The main chop or the main height of the wave were on the transom of the vessel itself and not on the bow. Besides that you had a wind at your stern so that any bow wave that you threw, starting any spray condition from these very minor swells, would picked up by the flare in the bow and blow forward and away from the boat by the force of this wind.

Q. Now, that is so much for the bow water. What would happen with reference to any spray that you might have gotten at the stern? A. Well, you might have some spray, you might take a little spray aboard, in the cockpit itself, but it wouldn't reach up as far as those windows.

Q. Now, then, how about the effect of spray at the location on near the location of those three windows, would there be any spray there? A. You don't have spray in a boat of that type.

474 Q. Is it then your opinion that there would have been no spray whatsoever at or near the location of those three windows under these weather conditions? A. That would be my opinion, yes, sir.

Q. Let me ask you one other question. Is it significant in that illustration which you have made, that the ground

swell is of less magnitude than the wind waves? A. I would think so, yes.

Q. In what respect? A. Because it wouldn't present near the possibility of impinging on the vessel topside as would the chop.

Q. Yes, sir. A. As would the wind wave.

Q. Now, if on this occasion, there was located a tropical disturbance approximately two hundred and fifty miles, located in the Gulf of Mexico at a point 250 statute miles south of Eugene Light, what you expect the direction of the wind to be? A. With regard to Eugene Light, I don't think the tropical storm would control the direction of the wind at all at that particular time and at that particular distance.

Q. Well, is that or not inconsistent with there being a wind out of the northeast at thirty to forty miles per hour?

A. Well, it might conceivably be that the low pressure area began to form up there, which would have pulled those winds from the shore out in that direction from the northeast.

Q. Now, if we have the same problem that you have put on the blackboard, except that the wind was out of the northeast twenty-five to thirty miles an hour, does that make any difference in your opinion, instead of thirty to forty. A. Well, you might have a smaller chop, but I assume that that was pretty accurately observed. I don't think there would be any significant difference.

Q. If you had a small chop, would you have more or less spray? A. Well, we would have less spray over the transom.

Q. Yes, sir. A. The conditions as far as the bow and transom, assuming the swell is the same, wouldn't change.

Q. Allright, under this same state of facts, and you have described it to be a rolling occasioned by a ground swell of some magnitude; now, would that roll be of such magnitude as would occasion water on the deck and transversely along the side? A. No possibility in view of the type, design and GM of the vessel itself.

Q. Now, then, what is the GM of the vessel? A. 476 The GM of the vessel is the measure of the vessel's transverse stability.

Q. Now, by transverse, is that the stability of the boat with reference to roll? A. That is the ability to recover

from a heavy lift and to maintain the vessel righside up rather than to have it capsize in heavy weather.

Q. Now, do you know what the GM of the Stephens is? A. Yes, sir.

Q. What is that? A. It is 3.8 feet.

Q. Now what is the minimum GM for a craft of this size, do you know that? A. Approximately two feet would be the minimum requirement.

Q. Well, does that difference mean that the Stephens is more or less stable? A. It means that she is more stable.

Q. And is that with reference to roll conditions? A. That is with reference to transverse stability which is roll.

Q. What is the G in GM? A. The value of G is the center of gravity of all fixed weight on the vessel above the vessel's baseline, above the keel of the vessel itself.

Q. Now, this is the keel here? A. That is the
477 keel. No, the keel is the lowest point on the vessel. That would be the baseline, down below there.

Q. This is the base-line? A. To develop the position of G, you would take every weight that went into that boat, and multiply that weight by the lever, vertical lever arm and divide it all by the summation of the weight in pounds and you would come up with a dimension in feet which dimension would be the distance from the keel to the center of gravity of the vessel itself.

Q. Now, then, that gives you the distance transversely? A. No, that gives you height from the base-line up to the position of the center of gravity. That gives you the KG.

Q. That gives you the KG. Now, what is M in that formula? A. M is a metacentric height. The value of M is determined by the distance from the keel to the center of buoyancy, the center of buoyancy being the volume of displaced water on the vessel itself, and the distance BM is the function of the moment of the nature of the plane divided by the volume of displacement of the boat itself. The summation of those two, KB and RM gives you KM.

Q. Now, then, after your inspection of the vessel, do you have an opinion, assuming that there is water on the
478 top step, assuming that there is water on the top step of the ladder, do you any opinion as to where that water came from? A. No, sir, I have no opinion as to how that water could have gotten there.

Q. Well, could it have been tracked there? A. It could have been tracked, yes.

Q. Is that the only alternative?

Mr. Mandell: Your Honor, we object to that as a leading.

Mr. Bolton: I will withdraw the question.

The Court: Objection sustained.

Q. Mr. Bolton: Do you have an opinion as to the Stephens and its construction as compared to any other crew boat that you have ever been on in the Gulf or know about? A. She was an outstanding example for many years. Most of them are wood, they were surplus. That was a brand new boat and still completely out of steel and represented in my opinion, a very very excellent piece of design work. I have the highest respect for the man that designed this boat.

Q. Do you now know of any boat in the crew boat service, boat service in the Gulf that is any better than the Stephens?

479 Q. Mr. Mandell: We object to that.

Mr. Bolton: I withdraw the question.

The Court: Objection sustained.

Cross Examination

By Mr. Mandell:

Q. Excuse me if I don't go into the GM, because I don't know what you are talking about. Let's talk something about these port holes. To begin with, sir, I understand that you are a graduate of Tulane University Engineering School? A. Yes, sir.

Q. And that you took a correspondence course in Naval Architecture? A. No, sir—

Q. I mean an extension course. A. An extension course at Tulane University.

Q. Yes, that is what I mean, and you have been employed and you are still, I believe, employed by the Equitable Equipment Company? A. Yes, sir.

Q. Now, where do you work? A. In New Orleans, and we have a shipyard at Mattisonville and a shop in the suburbs of New Orleans.

Q. Well, where do you work? A. My work carries me to all three places.

Q. And principally where do you work? A. I spend most of my time in the office in New Orleans.

Q. Doing what? A. Doing design work. That is the main thing, production work on barges and work boats.

Q. And from time to time you go to the shipyard you were telling us about? A. No, sir, those are regularly scheduled operations. In my capacity, I am the production Manager and I go over there and check up on every job that we have going through the shipyard or the shop.

Q. What is your experience of operating vessels at sea? A. Well, at sea?

Q. In any water. A. In any waters or in the coastal waters?

Q. In coastal waters. A. The trial trip of every vessel that we have built of any major type, I have been on them, I have actually conducted the tests and I have operated the vessels. I have owned boats ever since I have been a very young man, and I have been on Lake Ponchatrain and Mississippi Sound.

Q. Then your experience in navigating vessels and watching the effect of the sea, the water upon the vessel is in connection with your building operations and your activities of a man who likes boats? A. No, I have 481 been out on boats. I have been out on crew boats of various types.

Q. In what capacity? A. In the capacity of an operator, in the capacity of an observer, and in the capacity of a production engineer. We have built numerous boats that are actually operating in the Gulf and I have been in the Gulf on those boats.

Q. When you say you were operating them, were you actually the Master of the vessel? A. I was not the Master of the vessel. In order to comply with all of the requirements you have to have a skipper aboard who is the wheel-hand.

Q. Well, just tell us what you did. A. Actually, I steered the boat, maneuvered the boat. I would make tests hard-over to hard-over, pump out, everything in connection with the vessel itself.

Q. You operated the vessel in connection with the tests, is that right? A. The tests and on subsequent operation, when we would be called back for complaints.

Q. So you had to do with tests and when some complaints were made, you would go out and check them, and see what you could do, is that correct? A. That is correct.

482 Q. So the operation of the vessel primarily was limited to the testing of the new craft in checking what should be done on craft that may have had some complaint about it, in addition to operating the vessel for your pleasure? A. Yes, sir, and so far as satisfying complaints, I would say that that was far more rigorous service than just plain operating a boat.

Q. Well, I am sure that you try to satisfy your customers. Now, you are of course in business of building new crafts, is that correct? A. We build, we convert, we re-build.

Q. That's your business? A. Yes, sir.

Q. And as you stated, you put in your bid to build the Stephens? A. Yes.

Q. But somebody else bid lower than you did? A. Yes, sir.

Q. And you are here at the behest of the Magnolia Petroleum Company to testify here? A. Yes.

Q. And at their request you went out to make these tests? A. Yes, sir.

Q. And the Magnolia Petroleum Company are customers of yours? A. I would say they are very very dim
483 customers. We haven't done any work for them since about 1947.

Q. You are still hoping, aren't you? A. Well, we are still hoping. It is kind of a dim hope. It is a poor hope. We are not here because they are customers.

Q. I didn't ask you that. Now, what is the purpose of putting port holes on a vessel with rings around them and gaskets around them and dogs around them? Why are all these precautions taken? A. To provide light and air and to insure a weather tight enclosure of the vessel's superstructure itself.

Q. Principally, it is put there to supply light and air, so you can have light when they are closed and you can open them if you want air? A. That's correct.

Q. And then, just as important as providing light and air, is to make them water-tight? A. Yes, sir, watertightness is important.

Q. You, of course do not know and I am sure you don't mean to tell the jury what the condition of the port holes on the port side of the Stephens over and above the steps leading from the galley, were during October of 1950, because you don't know? A. I could not say that.

484 Q. You don't know what, if anything, was done to or with those port holes since October 1950, up to the present, up to November, 1954? A. Well, if anything was done, they were brought right up to standard, because they were in excellent condition when I observed them.

Q. So then, if the testimony shows in this case, that a Master of the vessel, has found those steps wet with sea water, which fell or came from or accumulated because the sea hit the side of these port holes and water fell on them, and if your test is accurate, something had to be done to them inbetween? A. I couldn't say that happened, either.

Q. You assume something for Mr. Bolton. Will you please assume something for me. I want you to assume for me, please, sir, if during October 1950 or some time before October 1950, the Master of the Vessel did observe water coming in through these port holes, falling on these very steps, then is it your opinion as a master builder of vessels, that something had to be done to those port holes inbetween that time until you tested them, to find them in the condition that you did? A. Well, I didn't assume anything for Mr. Bolton.

Q. Well, will you please assume that for me? A. I inspected those port holes myself, the windows, myself.

485 Q. Well, you assumed something about all this weather, didn't you? A. On the basis on statistical data which was submitted.

Q. Alright, now, on the basis of the testimony that I just related to you, would, sir, assume that, for me? A. Well, now, are there any statistics to support that?

Q. The statistics are that some time during October 1950 and before then, water came through those port holes, fell on those steps. Now, if that be true, do you tell this jury that in all probability, in all certainty, something was done to those windows so that they would come through the kind of test that you gave them? A. Well, if they leaked at that time, if they leaked, which I still haven't received any support for, they didn't leak when I saw them.

Q. Well, let me ask you this. If the Master of the vessel would have told you, "Mr. Riess, before the end of October, 1950, whenever seas or sprays would hit those port holes, water would fall on these steps and these steps would be wet." Then you gave that test that you say you did in November 1954, wouldn't you come to the conclusion that in all certainty there was something wrong with those windows at that time? A. If the windows—in other words,

the hypothetical question being, if the Captain re-
486 ports that the windows were leaking?

Q. Yes. A. I would ask him then, "Have you loged it. Have you reported it?"

Q. I am not asking you that. Just answer my question.

A. Well, obviously if the windows are leaking, the windows are leaking.

Q. Therefore something had to be done to those windows in order to find them in the condition that you did in November 1954? A. If the windows were leaking—if the windows were leaking then, they were not leaking when I tested them.

Q. That's true, isn't it? A. I don't know whether it is true or not.

Q. I say is it true that something had to be done? A. The windows had to be repaired.

Q. Alright, that's what I asked you. Now, what is one of the principal reasons of having these port holes watertight when they are near or over a stairs which are used going up and down? A. To prevent water from encroaching on the companionway itself or to prevent water from entering the vessey. I wouldn't say that it had anything to do with the particular location. All of the vessels should be water-tight.

Q. I agree with you there, but would you as a mas-
487 ter builder of vessels take precaution to keep the sea water off of steps where men have to walk up and down them? A. This particular step?

Q. Steps. I will get to this particular step in a minute. A. Oh, yes, I would attempt to keep water from getting into the vessel.

Q. Attempt to keep it off the steps? A. I would attempt to keep it off of everything to keep it away from the inside of my boat.

Q. Would you please answer my question. Would you keep them off of steps? A. I would keep them off of steps, that being included.

Q. It is, is it not, sir, dangerous to have sea water on steps when the vessel is at sea and the vessel has a roll and a pitch, because it may injure somebody? A. That particular step?

Q. I am talking about that step right there, or any step. A. Any step?

Q. Yes, sir. A. It would depend on the step.

Q. I see. Now, we will get to this step. Are you saying that it is quite safe to walk on a step like that while the vessel is pitching and rolling with water on it? A. There is no substantial difference.

488 Q. You mean either dry or wet, it's just the same?

A. With that abrasive tread, in my opinion, there would be no substantial difference.

Q. Do you know what effect salt may have if it accumulates on these steps from sea water? A. Well, the water wouldn't be there, once the salt was there. The sea water would have to evaporate before the salt made its presence felt.

Q. That is correct because during sometime you may have calm weather and no water will come through; and then of course the water will either dry out or evaporate away. Don't you know, sir, that that sea water has a tendency to leave some residue on it which makes any step including this type of step slippery? A. I don't know whether—to begin with, if the water was there long enough for the water to evaporate, then somebody ought to come and pick the salt up, if the vessel were being maintained at all, as the craft probably was maintained, but the actual presence of salt, in my opinion, would not be a very contributing factor.

Q. It is not a safe thing, is it? A. I don't see the difference.

Q. Do you say it is safe? A. I don't say it is or it isn't. I don't see the difference between the step wet and the step dry. In my own mind, I can't understand that 489 with that abrasive tread.

Q. I am asking you a very simple question. Is it safe to have sea water—to have steps wet with sea water on a step of this kind?

Mr. Bolton: Your Honor, I am going to object to that. The witness has already answered, I believe, and furthermore it calls for a conclusion.

The Court: Objection overruled.

Mr. Bolton: Note our exception.

Q. Mr. Mandell: Will you answer the question? A. I think that the companionway would be safe, wet or dry.

Q. Talking about the steps, now? A. Yes, sir.

Q. Now, then, in October 1950, the window—and you recognize here on Plaintiff's Exhibit No. 9, the window, do you not? A. Yes, sir.

Q. If that window was leaking, water could have very easily fallen upon this very first step? A. It would have to trickle down the bulkhead, would it not, and come over this ledge, and then fall down below?

Q. I don't know which way it would have to go, but it would sprinkle down or roll down or pour down—would it get on this step? A. If the pathway of the water 490 was directly underneath, there was no change, it is entirely possible that there might have been water on the step provided the window was leaking.

Q. Well, I asked you if the window was leaking. A. Yes, sir.

Q. When you say that a port hole has to be water-tight, I assume you mean just exactly that water ought not to come through it? A. Water-tightness is a relative term. There are all types of definitions for it.

Q. Well, that's why I asked you, when you use the word water-tight, you mean that water ought not to go through? A. I mean that it should repel water, yes, sir.

Q. Now, if there is just steel and aluminum near the area, near the port hole, and just a little bit of water comes in, not to any great extent, maybe accumulated a quarter of an inch, no damage is done if you say that that doesn't make the place dangerous, is that correct? A. Assuming that the water is not present in such sufficient quantities to cause danger.

Q. What kind of danger are you talking about? A. I don't know. You are talking about a quarter of an inch of water. I don't think anybody has ever said that there was a quarter of an inch of water in that space.

491 Q. I am just asking you a simple question. Won't you please answer my question. I say, if you forgot

about your test, just answer my question, and I asked you a simple question. If you had a port hole that water comes through to the extent of maybe having a little water accumulate, maybe less than a quarter of an inch on the deck immediately below that port hole, if that was steel or aluminum or the kind of steps that you say these steps are; then the boat can't sink from that, can it? A. No.

Q. And if it's the type of steps you say you have got there are impregnable and are not affected by water, then they wouldn't hurt the steps, would they? A. The steps would be affected wet or dry.

Q. Alright, therefore according to what you say, it isn't very important to have these things really water-tight, so water does not come through? A. I think that you could stand some water through there. As I say, water tightness is a relative term.

Q. If enough water accumulated on those steps, so that when you touch them your hand got wet and you knew that your hand got wet, and if it came from one of these port holes or three of them, then you didn't have water-tight windows? A. There was some seepage, yes, or maybe
492 condensation.

Q. Condensation; looking at Plaintiff's Exhibit No. 9, could have come only from the contact—well, from the change of the air, to metal such as steel, is that correct? A. Well, if dry and a cold surface—would cause it.

Q. And did you make a test to find out what type of aluminum these window frames were? A. Did I make a test?

Q. Yes. A. No; I did not make a test of the aluminum because it would have ruined the frame to make a chemical analysis of it.

Q. You did not make a test? A. Of the type of aluminum?

Q. Yes. A. No, sir, I did not.

Q. Now, there are many types of aluminum, are there not? A. There are many alloys of aluminum.

Q. Yes. You can't tell what type of alloy of aluminum this was? A. Not just by looking at it, no, sir, no one could.

Q. Yet do know that since 1951, American Industry has developed aluminum that resists corrosion? A. Well, that aluminum was developed when this boat was built. The

alloys existed. That's nothing new. And I would
493 say that those windows were built with that in view
of the fact that they have lasted as long as they
have.

Q. Did you hear my question, sir? A. Oh, I thought I'd
answered it.

Q. Will you please read him my question?

(The Court Reporter reading:)

You do know that since 1951 American Industry has de-
veloped aluminum that resists corrosion?

Q. Mr. Mandell: Now, will you answer my question?
Do you know that? A. I think that American Industry is
progressive, yes, sir.

Q. Well, that's what I asked you, and you do know, do
you not that in 1948 and 1949, American Industry began
experimenting in aluminum alloys by attempting to get
some that will resist corrosion. That is not correct? A.
Well, that is incorrect. The alloys existed before that
time. We used them.

Q. Now, then, an inspection of the rims around the
port holes during 1950 and prior to October 1950, showed
that the frame around these three port holes that we are
talking about, over and above the steps leading to the
galley on the Stephens, did show signs of corrosion and
the gaskets were loose and away from there; then of course,
494 that aluminum that has been on the frames at that
time—if these facts I have stated to you are true

and correct, would not lead to corrosion? A. What
evidences of corrosion were there? There are many evi-
dences. I don't think that just your statement that there
was corrosion is a true indication. I would have to have
some evidence of corrosion.

Q. What do you call corrosion? A. Corrosion is a de-
terioration of the frame, actually oxidization taking place
and the metal falling off of the sections being weakened
and the entire frame being jeopardized by the fact that it
was falling to pieces.

Q. Well, you are talking about the last stages of cor-
rosion? A. No, sir, I am not. That can take place very
very promptly with aluminum in contact with steel
or similar metals if electrolysis occurs.

Q. What if the person who examined those aluminum
frames during 1950 and before October 1950, found them,

to be—that there was corrosion there and there electrolysis—what was that word you used, electrolysis or what else? A. Any electrolytic action.

Q. You used some word— A. That is electrolysis.

Q. And found all the things that you said there, and the frames were pushed away. In other words; they were not tight, and the gaskets were loose around them, so 495 that they had to use a caulking compound, and that didn't hold it, then of course you would say that those port holes were not wafer-tight, wouldn't you? A. (No answer)

Q. Sir? A. I will make no answer to that question because I am unable to hypothesize to that extent in view of the fact that I later saw these same frames and they were in good shape.

Q. Well, how do you know it was the same frames? A. Well, they were not new. They hadn't just been rebuilt; they were the same dimensions.

Q. You saw them four years afterward? A. Yes, I will concede that it is possible that they were different frames.

Q. Well, thank you, sir.

(Recess)

Q. Mr. Mandell: When you made that inspection in November 1954, did you have occasion to examine what type of dogs there were dogging down the two port holes, oblong-like port holes, these two port holes—they were on the port side? A. Yes, they were.

496 Q. Do you know what they were made of? A. No, they were painted, so I couldn't say that definitely.

Q. Now, if they were made out of aluminum and then they corroded to such an extent that they had to be exchanged for brass dogs; that would indicate that that particular aluminum did not withstand the way it was expected to? A. If there were the case, yes, sir. That is hypothetical. If they didn't last, they had to be changed.

Q. And do you know, sir, that the same thing had to be done to the aluminum door knobs, to the door that opened up, going into the lounge, from the back and aft of the vessel? A. I don't know that, no, sir.

Q. Well, did you know that the same thing had to be done to—it is not a door knob, it is something that opens and closes the door. Now, that would indicate that that aluminum certainly did not stand up and had to be changed, wouldn't it? A. If that's the hypothesis, if it deteriorated, it went to pieces and had to be changed, yes, sir.

Q. Were you told when you examined those port holes, that after they put in those brass dogs and they tried to tighten it up to try to keep it water-tight, to keep the water out, that the aluminum sort of gave, the aluminum frame gave and part of it pushed out? A. No one ever told me that, no, sir.

Q. If they had told you that, of course you would have had a different opinion of the frames, that if it did resist that or it didn't, during and prior to October 1950—

Mr. Bolton: If the Court please, we object to that. He hasn't expressed what opinion he had as they existed on or prior to that date.

Mr. Mandell: On the contrary, the Court just let him do it.

The Court: Objection overruled.

Mr. Bolton: Note our exception.

Q. Mr. Mandell: You would have a different opinion, would you not? A. I wouldn't have any opinion except on what I saw, the windows I saw—on the basis of that design, is the basis on which I maintained the windows were as they were.

Q. On the day you saw them? A. On the day that I saw them. Nobody gave me any opinion, nobody coached me, nobody gave me anything. I saw what I have related here.

Q. I didn't suggest that anybody coached you. The reason that I asked you whether anybody told you that was because sometime before, you said, "Well, I would have to have some more information." And I was giving 498 you some more information. A. No one told me that.

Q. Allright. Now, then, having qualified yourself as man who knows something about the conduct or the action of the waves and the seas and the swells, are you acquainted with what is known as the Buford Scale? A. I have seen the Scale, yes, sir.

Q. Do you know that it is a recognized scale by all Merchant Marines throughout the world? A. Yes, sir.

Q. And you also heard of Mr. Bowdich, who wrote a navigation book? A. Yes, sir.

Q. Regarded by many seamen as the Seaman's Bible, so to speak? A. Yes.

Q. Now, if the Coast Guard gave a description—by the way, the Coast Guard does issue weather reports and descriptions of the sea's action and the waves and the wind and so forth from time to time, you know that, don't you?

A. They are the source of that information, yes, sir.

~~Q. And you know that they use approved terminology for expressing the condition of the sea?~~ A. Yes, sir.

Q. Now, if the Coast Guard gave a report showing 499 that the sea on October 19th, 1950 was rough, and

Mr. Buford says they are rough, these waves, five to six feet— A. You mean Bowdich, don't you?

Q. Yes, sir, if Mr. Bodwich says rough means that waves five to six feet, you would accept Mr. Bowdich's word for it, wouldn't you? A. Oh, I am not an authority on that.

Yes, I would assume that I would accept his word on it if your hypothesis is correct.

Q. Well, this time you can look at it and see. What does it say there? A. It says, "rough".

Q. Yes, sir. A. It doesn't say anything about the height of the wave.

Q. You can only do one thing at a time. It does say, "rough" there, doesn't it? A. Yes.

Q. This is Mr. Bowdich's book? A. Yes.

Q. And that is the man we were talking about? A. Yes, sir.

Q. And you have told us that the Coast Guard uses proper terminology, didn't you? A. Yes, sir.

Q. And you saw that "rough". What does Mr. 500 Bowdich say opposite "rough seas"? A. "5 to 8 feet".

Q. Alright, now, then, if you had a sea five to 8 feet, and if that sea—let's just assume, please, sir,—the sea was facing the vessel, was hitting the bow of the vessel this way, and this way. Would such seas have a tendency to hit the port holes? A. The seas themselves?

Q. Either the sea or the spray. A. If the weather was coming at you off of the bow, if the spray was being blown

out from the flare and the wind was in the direction in-board, you would get spray on the deck, yes, spray on the super-structure.

Q. And if on the morning of October 19th, 1950—the facts are that—well, let me ask you this—do you know Beacon No. 7? Well, you told us so. If this very vessel, the Stephens would have left Beacon No. 7 going toward Morgan City, which way would that boat be headed? A. That boat would be headed out of the south in a north-easterly direction.

Q. Right in the face of that wind like you say it was coming? A. Right into the wind, yes, sir.

Q. And if the wind at that time, I mean if the sea at that time was as the Coast Guard says it was, and 501 if, as Mr. Bowditch says, rough seas means 5 to 8 waves—waves 5 to 8 feet high, then you would have an entirely different situation than the one you have shown us? A. Yes, but in view of the locale of the boat, I doubt whether those seas in that depth of water would attain the height which this Mr. Bowditch indicates which is probably on the premise of open sea. That is an offshore breeze coming down from that direction and you are blowing water off of the shore. You are not piling water up behind to make the waves high. Those would be minimum waves on an offshore set-up.

Q. But the fact is, is it not, that you would have the opposite situation than the one you described on there? A. You would be putting a bow into the chop, yes, sir.

Q. And whether you have 5 to 8 foot waves or 3 to 4 foot waves, depending on how much water had accumulated, the likelihood of sea sprays hitting those port holes would be greater than the position you had on that blackboard? A. The vessel being headed directly into the wind?

Q. I don't know. I just told you. You are the expert and I am not. I showed you which way it was going. A. Well, we never developed the true course of the vessel actually. Would it be developed right into the wind? We haven't got the true direction of the wind. If it is going right into the wind and it is being thrown out, 502 it could be blown past those things, actually hitting the deck and not impinging on the windows.

Q. Would it have a different effect than the one you

have on that blackboard? A. Of course, yes, the boat is reversed.

Q. Then if, however, there was some confusion, and if it was raining—depending who the wind was blowing—there was greater likelihood for spray to get on the port side of the vessel than in the position you have it now? A. There is a greater possibility of spray getting on the weather deck. As to the location, I would not say.

Q. And these gentlemen, Messrs. A. H. Glenn & Associates were correct and you had a 30 to 40 mile wind, wouldn't that cause a 30 to 40 mile wind, wouldn't that make the spray practically envelope the vessel? A. No, sir.

Q. You have never seen that? A. I have never seen a vessel enveloped by spray. Do you mean all over the vessel, the cockpit, the whole thing? covered with spray?

Q. You have these waves hitting either headon or athwartwise, wouldn't it spray practically this way? A. No, sir, that would not happen.

Q. Have you been out in rough weather? A. Yes, sir, I have been out in worse weather than that and haven't been enveloped.

Q. Have you been out in boat like the Stephens? A. Yes, they were similar vessels, wood.

Q. I believe you have told us that there was a scupper or a drip pan, I don't remember the terminology that you used, on the outside of this larger window on the port side? A. Yes, sir.

Q. And it isn't shown on this model? A. No, it is not shown on that.

Q. And it isn't shown on this picture, is it? A. No, sir. Well, I can explain it to you on the picture. Actually this drip lip is brought up higher and there are two small holes drilled in the back, which will allow the water accumulating behind the drip lip to drain out.

Q. You don't know of your own knowledge when these holes were drilled in there? A. Whether I saw them drilled, no, sir, I don't know when they were drilled.

Q. If, on the inside of these two smaller windows, these port holes we are talking about on the port side, you know— A. The galley?

Q. Yes, sir. Now, those are over part of the stairs, are they not? A. They are forward of the

bulkhead. They may be over the bottom of the steps, but I would say that it was a very very minor part of the steps, if at all. There is a bulkhead there.

Q. Now, there was enough of an angle iron, I believe, about an inch or so across it and formed like a little trough? A. A drip pan inside; yes, sir.

Q. Well, it wasn't really a drip pan, it was more of a trough, was it not? A. Well in Marine terminology that would be a drip pan or a drip lip.

Q. Alright, we will call it a drip lip. If as much as one inch of water accumulates in there, you would have a—and you have a pitching of the vessel, that water would slosh, would it not? A. Yes, sir, it would move back and forth.

Q. And depending on how far this water would slosh, how far the vessel would pitch or roll for that matter, as to with how much force and how far that water would come, isn't that correct? A. Yes, that would be correct.

Q. It is true, is it not that drawings on an architect's or designer's table, models in a shop or even if it is not in a shop, a person who gave his time and genius to 505 it still is in no better position to tell, just to say just exactly what these creative things may do, as the man who day in and day out uses it. That is where the actual test really comes in. That's true, isn't it? A. No, sir. I wouldn't say that. I think the designer is as fully equipped as any operating man to say what a certain piece of equipment will or will not do.

Q. Isn't it true that ships, planes and other things that are used for transportation are designed with the greatest of care, tested and then when they are put in use, bugs are found in them? A. Yes, sir, that is correct.

Q. Because nothing is as good as the actual test as it is used itself, that's true, isn't it? A. You find bugs in anything. I think that is a correct statement, yes, sir.

Q. And after it has been put to use, put it to the acid-test day in and day out, and from the experience that you gain after its use, then you learn what must be done to make that as fine a product as you possibly can? A. But it doesn't take you very long to find that out. Certainly not as long as these windows were in use. You can find that out quick. It doesn't take you a year to develop that sort of information.

Q. Well, corrosion takes some time to develop, doesn't it? A. In the case of aluminum, I would say not, no. 506 If it begins to corrode, the action is relatively rapid, and if it is rapid and if it is reported, it is the greatest duty to correct it as quickly as possible.

If it becomes dangerous, it should be corrected.

Q. Mr. Bolton has shown you this step here—actually, if you look at the picture—that this is really not all the step here. This is really not actually all of the step, is it? A. No, sir.

Q. There is about an inch or an inch and a quarter that sticks out further— A. What do you mean, the flange lip of some of the steps?

Q. Yes. A. Yes, sir.

Q. And they are made out of what, do you know? A. I don't know. That was painted, I believe. I couldn't say that definitely.

Q. Did you, in November, 1954, see these worn places on these steps? A. Yes, sir.

Q. Well, then, they were not painted, you can really see them? A. Well, you can see them, but you wouldn't be able to develop the actual—but I think the specific answer to your question, as I recall it, this was painted. It 507 don't think there is any wear on that.

Q. Well, you see what I am talking about. Do you see some there? A. There is wear on the step nosing.

Q. From that wear, can you tell what material that was? That is what I am asking you. A. This is aluminum, yes, sir.

Q. This here? A. That I could not say..

Q. So actually the step lip's place was about an inch and a quarter wider than the one we have here? A. There was a nosing, a flange nosing for strength.

Re Direct Examination

By Mr. Bolton:

Q. I hand you a bundle of reproduced papers, (marked DEFENDANT'S EXHIBIT 20.) You don't need to look at all of them, but I will ask you to look at the first one and see if you can identify what that is. A. Those are the contract

spec's for the passenger launch for the Magnolia, which was the J. C. Stephens.

Q. Did you have such contract specifications in your possession, in the possession of your Company at the time you made your bid upon the Stephens?

A. Yes, we did.

Q. Do you still have those? A. We still have them, yes, sir.

Mr. Mandell: If the Court please, Mr. Bolton tells me that he is about to introduce this first page, and I do not see the materiality of it, nor do I believe that it is properly proven up as to warrant its being introduced as an exhibit.

The Court: I sustain the objection.

Mr. Bolton: Is it on the ground that we haven't proved it up?

The Court: There is no connection with the ultimate subject.

Q. Mr. Bolton: Well, I will ask you further then, Mr. Reis, if this contract, this document entitled Contract Specification, has on it a date, a stamp of a shipyard and the signature of someone whose signature appears as president of the Shipyard.

Mr. Mandell: Just a minute, Your Honor. I object to that. We don't know who put the stamp on there, nor what the stamp is.

Mr. Bolton: I was going to ask first what the stamp is.

509 * The Court: Overrule the objection.

Mr. Mandell: Note our exception.

A. Yes, I know Wills-Stedden, Santos Liskey personally. I know him. He was connected with Wills-Stedden at the time the vessel was built. It does have such an endorsement on it, yes, sir.

Mr. Mandell: I object to the answer as not being responsive:

The Court: Sustained.

Q. Mr. Bolton: Did you know Mr. Liskey? A. Yes, sir.

Q. How do you spell that name? A. L-i-s-k-e-y.

Q. Do you know whether or not he held a position with Wills-Stedden Shipyards, Incorporated, in November of 1948 and February of 1949?

Mr. Mandell: We object to that, Your Honor, because it is irrelevant and immaterial.

The Court: Objection overruled.

Mr. Mandell: Note our exception.

A. Yes, he was with Wills-Stedden.

Q. Do you know his signature? A. No, sir, I do not.

Q. Do you know whether or not this particular page of the document is one that was in the hands of Wills.

310 Stedden Shipyards as contract specifications for the Motor Vessel, Stephens?

Mr. Mandell: Your Honor, I don't see how he could possibly answer that question except on information—

The Court: He asked him if he knew.

Mr. Bolton: I will withdraw the question.

Q. I will ask you to examine the first page and tell whether from such examination whether you had forbidding purposes to these specifications at the time the bids were let upon the motor launch, Stephens. A. Yes, sir, I recognize the format, the Mimeograph and this series of plan numbers.

Q. Is this a set of specifications which was furnished bidders upon the Stephens? A. Yes, sir.

OFFER IN EVIDENCE

Q. At this time I renew my offer of the first page. (DEFENDANT'S EXHIBIT No. 20.)

Mr. Mandell: We make the same objection.

The Court: Sustained.

Q. Mr. Bolton: I will ask you whether or not you know what the aluminum specifications called for in the construction of the Stephens was.

Mr. Mandell: We submit that that is irrelevant and immaterial, because this gentleman did not build it, and what bid he made and what specifications lie passed on, is 311 irrelevant and immaterial.

The Court: He asked him if he knew. I overrule the objection.

Mr. Mandell: Note our exception.

A. Yes.

Q. Mr. Bolton: What was that specification?

Mr. Mandell: Just a moment. We object for the reason stated and because the bid that he has made, was something that he passed on and he did not build—is irrelevant and immaterial.

The Court: Overrule the objection.

Mr. Mandell: Note our exception.

A. There was an Alcoa aluminum designation for Marine use, which is Alcoa 61 S T. That was the alloy.

Q. Mr. Bolton: Is that an alloy which is used in Marine construction? A. Yes.

Q. And is that an alloy which is particularly suitable for alloy construction? A. It is particularly suitable.

Mr. Mandell: If the Court please, I object to that as being leading and suggestive.

The Court: Objection sustained.

Q. Mr. Bolton: Will you state whether or not to your knowledge Alcoa 61-S T is used in Marine construction? A. Yes, sir, I have used it.

Q. And is it a suitable aluminum alloy for that use? A. Yes, sir.

Q. With reference again to these two galley windows and the drip lip or pan, let's assume for me as you did for Mr. Mandell, that water did get in that pan and that the ship rolled, and that the ship rolled severely, do you have an opinion as to whether any water which might have been in the pan and had gotten out of the pan could have possibly physically reached the top step of that ladder? A. Yes, sir, in my opinion it couldn't.

The Court: He did not ask you for the opinion. He asked you if you have an opinion.

Q. Mr. Bolton: Do you have an opinion? A. Yes, I have an opinion.

Q. What is that opinion? A. I don't think that it could have reached the top step.

Q. You were asked by Mr. Mandell about salt water evaporating or salt from salt water getting upon the aluminum tread here on Defendant's Exhibit 2. Do you know what would have happened at any time following such salt getting there; if it did, the step was or was not damaged with fresh water? A. The salt would have dissolved and gone away.

Q. That's all.

513 Re Cross Examination

By Mr. Mandell:

Q. If the water did slosh out from that little drip lip and it fell and accumulated on the step below, anyone using those steps would have walked on the water? A. Yes, sir.

Q. And one more question. Have you ever been out on these drilling barges? A. Yes, sir.

Q. And they covered with oil and grease? You have seen them. A. We have converted and we have built them.

Q. I say, when they are in operation. A. Yes, sir, I have been on them.

Q. They have oil and grease on them, don't they? A. Yes, sir.

Q. I believe that's all.

514 J. V. GIBSON, a witness produced by the Defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Bolton:

Q. State your name. A. J. V. Gibson.

Q. And you live at Morgan City, Louisiana? A. That's right.

Q. By whom are you employed there or connected with? A. The Atchafalaya Ship Building Company.

Q. Is that in any way connected with or owned by the Magnolia Petroleum Company? A. No, sir.

Q. What is the nature of the business connected by the Atchafalaya Ship Building Company? A. General Machine Shop and repair work.

Q. For Marine Vessels? A. Marine Vessels, oil field and just about anything that comes up we try to take care of it, yes, sir.

Q. Do you have a Marine Ways in connection with your business? A. No, sir.

515. Q. Are you familiar with the Magnolia Petroleum Company Motor Vessel, J. C. Stephens? A. Some, yes, sir.

Q. Have you in times past had occasion to do work or repair work in connection with that vessel or some of its appertenances, appliances or windows? A. We have.

Q. Now, this is a model of the superstructure of the Stephens? A. It is, yes, sir.

Q. And this of course, is the starboard side? A. Yes, sir.

Q. Did you on any occasion have occasion to do any work in connection with—first I will ask you about the galley windows. A. Yes, sir, we have.

Q. These two windows on the port side as the ones I am pointing to on the starboard side? A. That's right, sir.

Q. When was that? A. That was in January, 1953.

Q. Now, is that the first time that your Company had anything to do with that? A. Those windows, yes, sir.

Q. How long have you been connected with that Company? A. Twelve years.

516 Q. Twelve years? A. Yes, sir.

Q. At Morgan City? A. Yes, sir.

Q. And you were there during the years 1949, 1950, 1951 and since? A. That's right.

Q. Now, then, describe, if you will, what work you did or had done under your direction in connection with those windows, that you personally know about. A. Well, in January 1950, we were requested to remove four windows.

Q. I beg your pardon. Did you say '53 or '50? A. I said '53, sir. We were requested to remove four windows in the galley of the Stephens and replace the frames on the glass and re-install them back to the boat.

Q. Are those the two windows port side, and two windows on the starboard side? A. Yes, sir, two windows, port and starboard.

Q. Alright, now, then, did you at that time—well, tell what you did do with reference to those windows. A. Well, we removed the four windows and taken them into our shop and taken the frames from the glass, manufactured new frames, fitted them to the glass and re-installed them back to the boat.

517 Q. Alright, now, this was when? A. That was in January 1953.

Q. At that time did you have occasion to inspect the windows as installed in the boat? A. That is right, sir. I inspected them after they were installed.

Q. Did you inspect them before they were removed? A. No, sir.

Q. Did you see them after they were removed and brought in and before they were replaced? A. That's right, sir.

Q. Now, then, what portion—first, this is Defendant's Exhibit 19. Will you examine that and tell what that is? A. Yes, this is the window that we repaired on the J. C. Stephens.

Q. It's a drawing of the window? A. It's a drawing of one of the windows, yes, sir.

Q. Were all four of the windows constructed light? A. No, sir, we replaced the window frames with the identical material which was on them.

Q. Were all four of the windows which you worked on of light construction? A. They were.

Q. And so this drawing shows the construction, not only of one of the windows, but of all four that you 518 worked on? A. That is right.

Q. What did you do to them? A. We taken and removed all of the metal framing from around the glass and replaced it with a new framing throughout.

Q. Allright, now, what did you use for templets in making the new frames? A. We used the old frames?

Q. Was the old frame intact enough to be used as replacements? A. They were.

Q. What was the condition of the old frame in January 1953? A. They were deteriorated slightly.

Q. Can you describe the deterioration, was it in any particular place, or where was it? A. Well, the deterioration was mostly around the bottom and on the inside of the aluminum where salt water corrosion had attacked it.

Q. Now, then, when you replaced those windows on the Stephens, did you replace them in the same manner in which they had been before they were removed? A. That is right, sir.

Q. Was there any change made in that insulation different from shown on that drawing? A. No, sir.

519 Q. What was the condition of the gaskets taken from the windows when you removed them? A. You mean the gasket and the frame or the gasket and the windows themselves?

Q. First I will ask you about the gasket in the cabin frame. A. The gasket in the cabin frame was not replaced because it was not necessary.

Q. You used the same gasket in replacing the window—
A. That's right.

Q. —that you found there at the time you removed it, and that gasket is the gasket which is shown on the drawing at this point and below it? A. That's right, that is a $\frac{3}{8}$ th inch square neoprene stripping.

Q. Had that gasket deteriorated in any way? A. It had not.

Q. With reference to the gasket on the window, what did you find? A. The gasket on the window when we removed the frame from around the glass, we had to scrape the compound that was used for sealing the glass to the frame, away from the glass.

Q. Did you use a new gasket when you replaced it? A. We used new compound.

520 Q. Did you use the same gasket? A. The same type of compound, but not the same gasket.

Q. The same type of? A. Compound that was used, that was in the window to begin.

Q. What type of compound was that? A. It was a seal seam compound.

Q. Is that used in Maritime work? A. Yes, it is recommended for sealing windows and glasses.

Q. Now, when you replaced the windows in the Stephens, did you do that with reference to each of the four windows that I have pointed out here? A. Yes, that's right, sir.

Q. And then did you inspect the job which your Company did in replacing that and in making the repairs you have stated? A. That is right.

Q. Were there any other repairs made to the cabin of the vessel? A. No, sir.

Q. In connection with the windows? A. No, sir.

Q. And have you described all of the repairs made to the windows? A. All with the exception that when we repaired, made up a new frame, we replaced the brass eye bolts that were on the frame to hold them close, with Monel.

521 Q. At the time then, that you removed the windows, you found brass eye bolts, and that was in January of 1953? A. That's right, sir.

Q. And those eye bolts are used to hold the windows tightly close, is that correct? A. That's right, sir.

Q. And you replaced those with what? A. Monel.

Q. Is that a kind of stainless steel? A. That is a non-corrosive metal.

Q. Now, when you replaced the same gasket with your new frames made from the templets of the old windows, did you or not get a water tight closure at the window space? A. The windows were seating up to the gasket, yes, sir.

Q. All around? A. That's right.

Q. Had you done any work on those windows before that time? A. No, sir.

Q. Have you done any work on those windows since that time? A. Yes, sir.

Q. When was that? A. Well, in December, the windows were removed from the J.C. Stephens and sent to my shop to take an inspection for re-sealing.

522. Q. That was in December of what year? A. December 1954.

Q. And did you inspect them and then re-install them? A. No, sir, we did not.

Q. What did you do? A. The Magnolia personnel removed them and sent them to our shop. We pulled them apart and inspected them and put them back together, resealed them and they put them back on the boat themselves.

Q. At that time, did you replace the frames of those windows in the galley? A. No, sir.

Q. Now, then, I will ask you whether or your Company at any time before December 1954, removed or repaired or did any work of removal or repair on the windows on either side,—well, I will ask you about the port side window which is on the port side as this one is on the starboard side of the boat immediately aft of the two windows in the galley? A. No, sir.

Q. You have never done anything in connection with those windows? A. No, sir.

Q. Did you, at the time you replaced the eye bolts on the other windows, replace the eye bolts on those windows? A. I did not replace those directly, sir.

523. We made up some eye bolts for replacement for the windows on the J. C. Stephens on an indirect order.

Q. And when was that? A. That was August 16th, 1951.

Q. On August 16th, 1951? A. Yes, we made up some brass eye bolts for the J. C. Stephens.

Q. How many did you make up at that time? A. We made up four.

Q. You did not know though, whether those were installed? A. No, sir, I don't.

Cross Examination

By Mr. Mandell:

Q. Of course you are testifying only about things that you know about that were done in the machine shop of your employer under your direction? A. That's right, sir.

Q. You don't know if anyone else in the other companies, whether from the Magnolia Company or not, fix any brass dogs before that time or not? A. I do not know.

Q. Neither do you know whether or not the gasket behind the frame—that is the one you said you put back? A. The seam seal compound that was used to seal the glass to the frame.

524 Q. Then you changed the gasket? A. Yes, sir.

Q. But I believe you said another gasket you didn't change, or did I understand you right? A. That was the neoprene gasket in the housing frame.

Q. Housing frame? A. Yes.

Q. Where the frame fits in? A. That's right.

Q. That one you didn't change? A. No, sir.

Q. So you yourself don't know who, if anybody, changed that gasket some time before you did? A. I have no way of knowing that.

Q. All you are telling us is that in January 1953, you did change gaskets around the window, but not around the frame? A. That is right.

Q. And if there was anyone else who changed gaskets either around the frame or around the window before that time, you don't know one way or another? A. I have no knowledge of that.

Q. Now, you say you used Mojel. Is that some kind of steel?

526 Re Direct Examination

By Mr. Bolton:

Q. What was the material which you used in making the replacement frames in December, 1953? A. The same type of material that was originally in the frames, 61-S T aluminium.

Q. Now, then, in December of 1954, how many windows were brought over to your place? A. Four.

Re Cross Examination

By Mr. Mandell:

Q. Were these four that had been on the port and starboard side? A. That's right.

Q. The same ones that Mr. Bolton showed you? A. Yes, the two on the port and the two forward on the starboard.

Q. Now, one more question and I will be through. You don't know how long before January 1953 when you found the frames corroded; you don't know whether that frame was put on a year before or two years before or when? A. I do not.

Q. Is it usual for frames made of the type of material such as that to corrode within one year? A. No, sir, it is not.

528 CECIL M. RHODES, a witness produced by the Defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Bolton:

Q. State your name. A. Cecil M. Rhodes.

Q. Where do you live? A. My present address is Morgan City, Louisiana.

Q. You are employed by the Magnolia Petroleum Company? A. Yes, sir.

Q. In what capacity at this time? A. I am Assistant Production Superintendent of the Louisiana Gulf District, Magnolia Petroleum Company.

Q. Now, the Louisiana Gulf District is the district for Magnolia Petroleum Company which handles the offshore production, the offshore wells, drilling and production of wells? A. All of the offshore drilling and production of wells in the Louisiana Coast.

Q. In the Louisiana offshore? A. Yes, sir.

Q. You do not have anything to do with onshore locations? A. Up to now, we have nothing to do with onshore.

Q. Now, then, Mr. Rhodes, prior to that time, before then, what was your connection with Magnolia Petroleum Company? A. Just prior to being promoted to Assistant Superintendent, I was production foreman for about a year. Prior to that time, I was Marine Foreman.

Q. Were you Marine Foreman during October of 1951? A. Yes, sir.

Q. 1950? A. Yes, sir.

Q. When had you become Marine Foreman, if you know? A. I was made Marine Foreman in September 1946. I held that position until May 1952, I believe.

Q. Were you employed as Marine Foreman by Magnolia when you first came with Magnolia? A. I entered the employment of Magnolia as a geophysical helper in 1940. I became Marine Foreman after I got out of the Service in 1946.

Q. What was your ~~was~~ service? A. I graduated from Mid-Skipper's School at the United States Naval Academy. I spent a short time in destroyers, a short time in destroyer escort, the remainder of the was in sub-marines.

Q. Do you actually serve on sub-marines during 530 the war? A. I made two war patrols on submarines.

Q. In the Pacific? A. In the Pacific, yes.

Q. And prior to that time, were you on destroyer escorts? A. Yes.

Q. Did you say destroyers before then? A. Yes, sir.

Q. Did you actually have sea duty? A. I was in the Battle of Sable Island in the South Pacific in 1942. In 1943 I was in escort duty in the North Atlantic.

Q. And did you serve as an officer after you graduated from Mid-Skipper's School? A. I served as an Ensign, and as a Lieutenant J.G. and as a full Lieutenant in the Navy.

Q. And are you now in the Naval Reserve? A. Yes, I now hold a Lieutenant Commander's commission in the United States Naval Reserve.

Q. Aside from that and before you went into the Navy, had you had any sea experience? A. None.

Q. I believe you are from Montana, are you not? A. That is correct.

Q. Not in the Ocean Belt? A. No.

Q. Now, then, Mr. Rhodes, as Marine Foreman for 531 the Magnolia Petroleum Company, what were your duties? A. My duties were to see that the Marine equipment that Magnolia Petroleum Company had was manned and correctly operated.

Q. And what did that Marine equipment consist of during about 1950? A. During 1950 we had six vessels that were company owned. We had a number of other vessels that were leased by our Company. We had a quarter boat, I believe it has been brought up in the testimony, the Magnolia Inn, and in 1950 we had six drilling barges operating in the Gulf.

Q. What classes of vessels were there under your control, did you mention tugs? Were there tugs? A. We had four crew boats, two sixty-five foot boats, a War Surplus eighty-three foot Coast Guard Cutter, the J. C. Stephens, two tug boats about one hundred feet long and one thousand horse power.

Q. In your capacity of Marine Foreman, were you or not familiar with the personnel and with the duties of the personnel in your Marine Division? A. I hired all of the personnel in the Marine Division and I helped write the job classifications and specifications for each job in that particular group.

Q. Did you have written job classification, job designation, job description for each of your personnel? 532 A. We did, sir.

Q. Did you have a written job classification for the engineer on the boat, J. C. Stephens? A. Yes, sir, we had that. I believe our Company classification number is 188-P.

Q. I hand you what has been marked Defendant's Exhibit No. 1, which consists of two pieces of paper on Mimeo-graphed paper and ask you to examine it and tell us what

it is. A. This is a copy of the Job Classification Code 188-P for a boat engineer.

Q. Do you know Mr. McAllister here? A. Yes, sir.

Q. Did you know him during October 1950? A. He worked for Magnolia Petroleum Company under my supervision.

Q. One question—was his job classification that of an engineer at that time? A. His job classification was engineer.

Q. Is that the job description of his job in effect at that time? A. Yes, sir.

Q. I will ask you whether or not you are familiar with the duties of the engineer on the motor vessel, Stephens? A. I am, sir.

Q. What are his duties with reference to his engine room? A. The engineer aboard the J. C.

533 Stephens and any other crew boat of our Company is to properly maintain the engine, to keep track of their operating hours, to make any minor adjustments and repairs, to keep his engine space clean, and then above and beyond that, to help the Captain and deckhand if there be any, to maintain and keep clean the rest of the vessel.

Q. You say if there be any, do you mean if there be a deckhand? A. Yes, sir.

Q. There is always a Captain, a Skipper, is there not? A. There has to be on any vessel, yes, sir.

Q. Now, in October of 1950, what did the crew of the Stephens consist of? A. It consisted of a crew boat Captain, an engineer and a sailor.

Q. Now, was there only one crew for that vessel? A. There were two crews. Each crew worked a week and then had a week off. They relieved each other.

Q. Was each crew composed of the same number of persons and were their duties identical for their opposite number? A. They were identical, yes.

Q. Now, were you responsible for the operation and maintenance of all of the vessels owned or operated 534 by Magnolia Petroleum Company? A. I was.

Q. Were you responsible for the cleanliness of those vessels? A. Yes, sir.

Q. And did you have people responsible to you for the cleanliness? A. I held each Captain responsible to me, yes, sir.

Q. What was expected of them with reference to cleanliness of their vessel, particularly with reference to crew boats? A. I believe the same instructions applied to them all. I think they were very simple. I have used the term many times. I told everybody that worked on the vessels that the Magnolia didn't care how much they spent for paint or for soap, but we expected them to use them liberally.

Q. And did you see that they did that? A. Yes, sir, as far as my job as Marine Foreman, I insisted on that.

Q. Now, how was cleanliness maintained? How did they keep their boats clean, when did they do it and so on? A. I think that was a never ending job. It was always going on; at every opportunity they cleaned and painted.

Q. Cleaning and painting is a continuous operation in Marine maintenance at all times, is it not? A. Yes, sir.

Q. And is that the way you maintained the fleet
535 of Magnolia vessels? A. That is the way the fellows on the boat maintained them, yes, sir.

Q. Now, did this engineer have any duties with reference to the cleanliness of the vessel, say when it was in slips at Morgan City? A. His primary cleaning position was in the engine room. However, it was generally understood that if the Captain and the deckhand needed help, that he would help them in other portions of the ship.

Q. Was there available and did they use in the home port there fresh water to wash down the ship? A. Yes, sir.

Q. And did they do that both inside and outside on the super-structure and on the inside in the compartments? A. Yes, sir.

Q. Was that a regular function of the crew of your vessels? A. Yes, it is.

Q. Well, how often is that done? A. I would say that each time the vessel came in and the crew had an opportunity to wash down, providing that the weather was such that it would be practicable, the vessel was washed down on the outside, and if there was any dirt accumulated, it was either swept up or mopped on the inside at any opportunity, regardless of the weather.

Q. Now, then, if the boat was underway and it was
536 found that there was, let us say, grease or oil, on any of the passageways or ladders, what was to be

done and what was done? A. It was specifically designated and I believe a general practice, that any unsafe condition or dirty condition existing on the boat was taken care of immediately.

Q. Now, then, did you in connection with your job hold any meetings with reference to safety in the operations of your vessels? A. While I was Marine Foreman, I tried to make it a practice to have a safety meeting with all personnel in port at least once each month.

Q. And were you able to pretty well keep that schedule? A. With a very few exceptions, we held a safety meeting on the first Wednesday of each month, as long as I was Marine Foreman.

Q. Alright, sir. Now, then, what records were kept under your supervision and required to be kept by you as Marine Foreman? A. There were essentially three records kept at that particular time. There was of course, the official logs of the boat, which by law is required to be kept on each vessel. We kept a daily operating report which in essence is a copy of the Ship Log, but it is made up on removable sheets where it can be examined and filed in our office.

537. And each week we made up a weekly inspection report, which was the crew's report to the Marine Foreman as to the material condition of the boat.

Q. I exhibit to you what appears to be the Log Book. It says Motor Launch or Vessel J. C. Stephens, is that the Log Book for the J. C. Stephens covering the period of time, October 1950? A. Yes, sir, I believe this is the Log of the J. C. Stephens covering that period.

Q. Now, that is the permanent Log, the Ship's Log that you say it was required to be kept by law? A. Yes, sir.

Q. Now, then, in your operation, you didn't have, as you did in the Navy, a smooth log? A. No, sir.

Q. And a rough log? A. No, sir.

Q. This is the Log and the only Log? A. That is correct.

Q. Now, I hand you what has been marked Defendant's Exhibit No. 5, and ask you to tell me what that is. A. This is a copy of the Daily Boat Operating Report.

Q. Is it an original or a copy? A. This is the original for the motor vessel, J. C. Stephens on October 19th, 1950.

538 Q. That is the daily—a copy of the Log as you have described it? A. That is right. This was supposed to be made out each day. However the crew was not required to turn it into the Office except weekly, and I suspect that at times it was made up from the Log at the end of each work period that the crew worked.

Q. Now, what purpose did that report serve you? A. This report served me—it gave me an idea of what the vessel did, the number of hours that it operated in various conditions, whether it was underway, sat the dock standing by, held up for weather. It gave me a record of the amount of fuel that it burned, the amount of oil consumed in the engine. It told me something about the weather that the boat encountered. It had a place for needed repairs or supplies and the crew was instructed to fill the report out complete.

Q: Now, then, did you use that as a means of obtaining or ordering or securing the needed repairs and supplies? Did you take your reports from that in many instances? A. This was an official way to handle any supplies or repairs, but not the only way.

Q. Now, then, I hand you what has been marked Defendant's Exhibit 4; and ask you to tell us what that is.

A. This is the Magnolia Petroleum Weekly Inspection Report. This particular one happens to be for the J. C. Stephens for the week ending October 24th, 1950. This particular report had to do with various operating data with the material condition of various pieces of equipment and various attachments of the ship. It also is, as it says, an inspection report. It is a report that any deficiency noted by the crew aboard a vessel should have been reported on. It was their way of putting it down on paper where it would come to the attention of the management of the Company.

Q. And come to your attention? A. It came to my attention first, also from time to time the various superintendents would examine these.

Q. And those were kept as a permanent record under your direction? A. Yes, sir.

Q. Now, were there any other records kept—I believe you said there were three, are these the three that you kept? A. Those are the three that I mentioned, yes, sir.

Q. And there were no other one? A. So far as I know, there were no others.

Q. Did you have anything to do with the design 540 of this form, getting it up? A. Yes, sir, we were requested by a general superintendent in Dallas to make some sort of a form.

Q. And is this the form that you came up with? A. This is the form that was finally arrived at.

Q. Now, then, this form says, (Reading) "It is absolutely necessary and important that all leaks in hulls, and hazards and unsafe conditions be reported immediately to the Port Engineer or Foreman." You were the Foreman? A. Yes, sir.

Q. And there is a Port Engineer? A. At the time that form was made, we had a man operating as Port Engineer. He never had that title, but that was his function.

Q. Now, did you really expect and did you require that that admonition, that instruction be kept on this form?

Mr. Mandell: We object to that question, Your Honor. I think the instrument speaks for itself. He is asking this man his construction of that instrument.

Mr. Bolton: Mr. Mandell intimated yesterday that the way to make this report was on some other paper.

Mr. Mandell: I didn't make any such statement.

The Court: Gentlemen, we won't argue the question. The objection is overruled.

Mr. Mandell: Note our exception.

Q. Mr. Bolton: Would you read the question back 541 to him, please.

The Court Reporter: (Reading:)

Now, did you really expect and did you require that that admonition, that instruction, be kept on this form? A. Those were my instructions to the Captain and the crew.

Q. Did you do that in meetings and individually also? A. Individually and in safety meetings, yes, sir.

Q. Now, then, have you been on the J. C. Stephens on many occasions? A. Yes, sir, I have spent many hours on the Stephens.

Q. Were you Marine Foreman at the time the Stephens was delivered to the Magnolia Petroleum Company? A. Yes, sir, I was.

Q. And have you been at Morgan City in one or another capacity ever since that time? A. I have been in Morgan

City and in the employee of the Magnolia Petroleum Company since April 1946.

Q. When did the Magnolia take delivery of the Delivery, if you know? A. I believe it was in December 1949.

Q. Are you sure that it was in the year 1949? A. No, sir.

Q. I hand you what has been marked Defendant's Exhibit No. 8, which is a photograph and ask you what 542 that is a photograph of. A. A photograph of the name plate on the motor vessel, J. C. Stephens, along with a frame sign, the name plate on the J. C. Stephens says, "Magnolia Petroleum Company Motor Vessel, J. C. Stephens, Hull No. 295, built by Wills-Stoddert Shipyards, Inc., Baltimore, Maryland, 1949, designed by W. D. Fletcher, N. A.

OFFER IN EVIDENCE

Q. We offer this exhibit in evidence.

Mr. Mandell: No objection.

Q. Mr. Bolton: Does that refresh your recollection about when you got the Stephens? A. Yes, sir. I knew the time of year. The vessel was commenced in the Spring of 1949, was finally delivered in the late fall and arrived in Morgan City in December 1949.

Q. Now, then, at that time do you know who the crew of the J. C. Stephens was? Was Mr. McAllister a member of the crew? A. I believe Mr. McAllister became a member of the crew immediately after the J. C. Stephens was delivered to us in Morgan City.

Q. Well, he was one of a crew of three. Now, who was the Captain? A. Well, there were only two men on the J. C. Stephens for the crew after it was immediately delivered. Of course, a short time thereafter we found 543 it necessary to have a three-man crew.

Q. Alright. A. Now, the four men involved I remember were George Rosson and Ferdinand Dressel, they were the two Captains, and Mr. McAllister and Mr. John Pullin were the two engineers.

Q. How do you spell that last name? A. Pullin, P-u-l-i-n.

Q. How many crew boats does Magnolia have at this time at Morgan City? A. We have six crew boats, sir.

Q. Are those all owned by the Magnolia Petroleum Company? A. Yes, all owned by the Magnolia Petroleum Company.

Q. And one of those is the Stephens? A. One is the Stephens, yes, sir.

Q. How does the Stephens compare in size with the other five? A. The Stephens is about the same size as one other boat we own, and it is larger than the other four.

Q. Do you recall the occasion or any occasion when Mr. McAllister reported, or do you recall the occasion when you first knew that Mr. McAllister had reported a fall on the Stephens? A. The best I can remember, Mr. McAllister himself, reported to me that he had slipped and fallen on the ladder on the Stephens.

Q. When was that, if you know? A. I believe it was somewhere in the neighborhood of October 19, 1951.

Q. Alright, sir, and where were you at that time? A. I was in the Morgan City Yard of Magnolia Petroleum Company.

Q. Do you remember what he told you on that occasion exactly? A. I can't give you our conversation verbatim, but as best I can recollect it went much this way. I am pretty sure the contents will be right. Mack said he slipped and fell. I asked him if he was hurt and he said, "I don't believe so, not too bad" and I asked him if he wanted to go to the Company Doctor, and he declined my offer. I said, "Well, put it in the Log Book, so we will have an official record of it, if something comes up later." And he said he had already done that.

Q. Was there any conversation had there at that time with reference to why or what caused him to slip or fall or anything of that kind? A. I didn't go into that, no, sir.

Q. And he didn't tell you? A. I don't believe we discussed the details of his fall.

Q. Did you later have occasion to know in 1953, in the summer at the time that Mr. McAllister was given a ticket of admission to the Marine Hospital in New Orleans? A. Yes, sir, I was not directly involved in that.

Q. Did you say indirectly? A. I was not directly involved.

Q. You were not directly involved. A. At that time, I was Assistant Superintendent and the Marine Foreman

that we had at that time and still have, Mr. Dufield told me that Mack would like to go to the Marine Hospital and he was giving him a letter of admission to the Marine Hospital.

Q. And that was at or about the time that he went, so far as you know? A. As far as I remember, yes, sir.

Q. Did you have any opportunities to observe Mr. McAllister's work? A. Yes, I have observed Mack. I believe he was employed in 1948 and served almost five years with our Company.

Q. Well, were you the one that employed him? A. I don't recollect that exactly, sir. At the time Mack was employed, there were a great many men being hired by our Company. I believe I did hire him though.

Q. Would you say he was a good employee? A. I considered Mack a good employee, yes.

Q. Now, then, Mr. Rhodes, you said earlier, I believe, that you had been on the Stephens, had spent many hours on the Stephens? A. Yes, sir.

Q. Have you spent many hours on the Stephens from the—has that been at frequent intervals ever since the Stephens was delivered in 1949? A. Yes, I believe I had ridden on the Stephens about once a week for every week since it was delivered to us in 1949.

Q. And that would be in connection with a trip with the Stephens? A. Yes, sir.

Q. And a trip with the Stephens is usually an all day affair out and back, is it not? A. It involves anywhere—a run of four to six hours, yes, sir.

Q. Well, have you been on the Stephens in various kinds of weather? A. I have been on the Stephens when it was flat, calm and sticky, and I have been on the Stephens when it was, what I would consider pretty rough.

Q. Well, would you describe what you consider pretty rough? A. The best I can recall, the roughest sea that I ever weathered in the Stephens was between seven and nine feet, I am aware that the Stephens has encountered much heavier seas than that.

Q. Now, seven and nine foot seas in that area are pretty heavy seas, are they not? A. I would say that is a heavy sea for our area, yes, sir.

Q. And I believe you said you had been on it in calm weather as well? A. Yes, sir.

Q. And on many more than one occasion? A. Yes, sir.

Q. Now, then, in connection with your duties as Marine Foreman, did you keep aware and did you know of the condition of the Stephens during all of that time? A. I believe I am qualified to say that I was well aware of the material condition of all of our Marine equipment.

Q. Including the Stephens? A. Yes, sir, including the Stephens.

Q. Now, then, with particular reference to the space of the galley, there has been much testimony here about the galley windows on the port side. A. Yes, sir.

Q. Do you know where they are? A. Yes, sir.

Q. And those are these two windows which I point to here? A. Yes, sir.

Q. And there is also a window, sometimes referred 548 to as the large window? A. Yes, sir.

Q. Which is aft of that? A. Yes, sir.

Q. Do you know the location of those windows? A. Yes, sir.

Q. Do you know the location of those windows in relation to the ladder and in relation to the landing on the ladder leading from the lounge deck to the galley? A. I am.

Q. Now, have you ever seen the water seep in around those windows? A. I have never seen water seep through it. I have seen water on the inside that I assumed seeped through the window.

Q. Now, then, describe that condition that you saw on those occasions. Was it on more than one occasion? A. I have noticed seepage through around the windows on several occasions.

Q. Now, then, when you noted that, did you take particular note of it? Was that your purpose, were you interested from a maintenance standpoint and the standpoint of the condition of your vessel? A. I was always interested in the maintenance standpoint of the vessel, but as making an investigation as such, I can't recall any time that 549 I actually looked at it to see if it was seeping.

Q. Alright sir, can you give us an idea of how much water you have seen on the inside of those windows or any of those three windows? A. I have seen evidences of seeping where the surfaces below them would be damp, sometimes on the galley deck it would be damp, discolored, you could see where water had come from some source.

From what the crew told me, I assumed it probably came from the windows.

Q. Now, then, to the galley floor—you have seen it? A. Yes, sir.

Q. Now, then, with reference to those two galley windows, I will call it, it has been described and discussed as a trip lip—is that there? A. Yes, sir.

Q. Has that always been there? A. Yes, sir; as far as I know, it was built into the vessel.

Q. Does it have a function, and if so, what is it? A. I believe the function of that lip is to form a collecting-base for any moisture that would seep or weep through the window; to keep it from falling directly on the floor.

Q. Now, you say weep, what do you mean by weep? A.

Well, if you take a piece of cloth, a heavy piece of 550 cloth, and you have water on one side and it eventually impregnates the cloth and comes through the other side, it is a very slow process, but the moisture is transferred through that piece of material. I call that a weeping.

Q. Now, around the window, where would this weepage or weeping take place? A. Well—

Q. Around one of these particular windows? A. That would be hard to say. If, for instance, a gasket was not absolutely tight, if there were any particles between gasket and frame, any place that water could find passage through, water is going to do it. I call that a weep.

Q. Have you ever seen water flow through those windows? A. No, sir, I have never seen water flow through those windows.

Q. Has the crew ever reported to you water flowing through one of those windows? A. I don't remember that that occurred, no, sir.

Q. Well, has the crew ever reported to you water coming through in such quantities that it would mean to you water in quantities of cups or gallons? A. No, sir, I don't believe that kind of leaking has been reported to me.

Q. And have you ever seen that kind of leakage? 551 A. No, sir, I have never observed that type of leakage.

Q. Have you ever seen the lip full of water? A. I don't recall ever seeing the lip full of water, no, sir.

Q. Now, then, those two galley windows were sometimes opened for ventilation, were they not? A. I believe when the vessel first came to us in the Spring and Summer following delivery in December, that those windows were opened occasionally; but I believe that since that time, and since the crew complained that there was weeping and leaking, we made it a positive policy not to open those windows.

Q. Now, then, have you inspected the vessel to find out where water which might weep in around those windows and which might fall below into the drip pan and which might by reason of the motion of the ship or which—or the filling of the drip pan—where would that water go if it fell inside the ship? A. It would either fall transversely in the boat or across the boat out of the drip pan onto the deck below, or it could follow longitudinally up and down the drip pan until it ran into the bulkhead or seat at the fore or aft end, and then it would probably flow down that bulkhead until it reached the deck.

Q. Now, then, that would be the deck of the galley?

552 A. Yes, sir.

Q. If it were on the after end? A. Yes.

Q. Or on the forward end, either one, it would be the galley deck? A. Yes, I believe on the forward end, it would fall on the seat. There is a seat just below that window.

Q. That is the seat with the table? A. Yes, sir, transversely.

Q. Can you conceive of any way that water leaking in, in that manner from those windows, could ever get up on the top step of that ladder? A. No, sir; not of its own volition, I don't see how it could do that.

Q. Well, by its own volition, you mean what? A. Well, it would have to be blown by strong wind or tracked by a person or transferred artificially from that trough to the step.

Q. Now, then, is there any strong wind which would blow from forward aft on that boat that would carry the water in that direction? A. I would know of no source of that kind of air movement.

Q. There is a draft if the engine room door is open? A. Well, if I remember, it was the standard procedure that the engineroom door between the engineroom and the

553 galley was run in a cracked position.

Q. Partially open? A. Partially open. We had two five hundred horse power engines with great big blowers on them and they puffed a considerable amount of air. That air could be supplied to the engine room from three sources, from down the stack; around the stack it had numerous ventilators around it where it was supposed to come in, or we had a manhole in the after cockpit, that was generally left open. Air could come in that way, or it could be pulled in through the lounge or pilot's down through this particular passageway and the ladder that we are talking about, around the corner and into the engineroom.

Q. Now, that kind of draft, if those blowers were pulling or if the engines were operating, would be in the direction of down the ladder rather than in the direction of up the ladder? A. That is correct.

Q. Now, then, there is no direct unobstructed way which water in that drip pan could splash on the top step of the ladder, is there? A. Not to my knowledge, no, sir.

Q. Well, you know about it; don't you, you know where that obstruction is? There is an obstruction there?

554 Q. There is one? A. Yes, sir.

Q. The bulkhead? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. Now, then, with reference to the window in the landing, you know on the port side? A. Yes, sir.

Q. You know what window we are talking about? A. Yes, sir.

Q. Did you or not have trouble with that window weeping? A. As I remember the reports to me, were that all three windows tended to leak or weep, but as to degree, the one over the landing had the less leaking or weeping.

Q. Now, then, have you seen water weep on the inside of that window? A. As I recall, I never have seen it, no, sir.

Q. Now, the source of any of that water with reference to those three windows is what? A. It would have to come in the form of rain striking that side of the boat or it would have to come or it would have to come from water that was sprayed or propelled to the port side of the vessel.

Q. There is no other source from outside, of either 555 rain water or sea water? A. I don't know of any.

Q. Unless you are washing the boat down? A.

Unless you are washing the boat down with a hose, yes, sir.

Q. Now, have you ever seen water on the top step of that ladder which did not come from the trackage, on the top step of that ladder? A. To be honest, I have never noticed water on the top step of the ladder.

Q. You have never noticed any water on the top step of that ladder? A. No, sir.

Q. Has anybody to your knowledge ever reported water on the top step of that vessel to you? A. No, no one has ever reported that there was water on the top step of that particular ladder on the J. C. Stephens.

Q. Have you had reports of water on the lower steps around the galley floor? A. I believe there was mention made that there could have been water there.

Q. Now, then, is it possible for water to leak through from the wheelhouse deck onto the top step of the ladder? A. No, sir, I would say that would be highly improbable.

Q. The wheelhouse deck doesn't overhang the top step of the ladder, does it? A. No, sir, it does not.

Q. And there is no wheelhouse deck above the ladder space, that is occupied by a bench which has no bottom at the deck level, is that correct? A. That is correct.

Q. That's an open space? A. Yes, sir.

Q. And have you ever seen water on the Stevens in such amounts as to flood the scupper at the bottom of the wheelhouse steps? A. No, sir, I have never seen that.

Q. And there is no communication, is there, in the space occupied by the wheelhouse steps and the space occupied by the ladder in the galley? A. No, there is none.

Q. Does the Stephens, in ordinary operation, in calm seas, does the Stephens take water over the bow? A. No, sir.

Q. Does the Stephens underway have a characteristic of raising the bow slightly? A. Yes, sir.

Q. And going down at the transom or stern? A. Yes, it does.

Q. Do you know the extent of that in degrees? A. I would say it would be between three and five degrees.

Q. Three to five degrees is the characteristic when the Stephens is underway? A. Yes.

Q. Does it get such characteristics when it is going so slow as half speed ahead? A. Yes, sir, I believe that func-

tion of movement in the water, as long as the wheels are turning, the back end tends to drop.

Q. How do you describe the hull, the bow design of the Stephens? A. It would have fine lines and a lot of flare.

Q. What is the function of flare? A. Flare is the design of the vessel to throw any water that is formed in the bow wave away from the vessel.

Q. Now, then, in calm seas, say on your river, your Atchafalaya River, that is an ordinary—the Stephens makes that run up and down the Atchafalaya many times, doesn't it? A. Yes, sir.

Q. It is a river, is it not? A. It is a very deep river, however, at times, there is a pretty good sea on the river.

Q. There are times when there is no sea? A. Most of the time it is flat, calm.

Q. Now, then, in that kind of water at high speed, 558 at maximum speed, would the Stephens be taking water over the bow? A. No, sir.

Q. Now, approximately how much freeboard does the Stephens have underway, in say, calm seas? A. I would say in the neighborhood of sixty-seven feet forward.

Q. Does that mean that there is approximately sixty-seven feet at approximately this position on the craft above the water line to the main deck? A. Yes, sir; that's correct.

Q. Now, are these windows located above the main deck? A. They are.

Q. The two forward windows, how far above the main deck are they located? A. About one foot.

Q. And the aft window over the passageway, how much? A. I will say the butt of it is at least two or two and a half feet above the deck level.

Q. So that under those conditions, the Stephens would have the entire freeboard of six or seven feet, would have the additional height to the bottom of the window, or would have the additional height to the top of the window, in order to see how much would go to the top of the window? A. I don't think you could use sixty-seven feet at

that particular point. It would probably be in the 559 neighborhood of five to six.

Q. Five to six feet approximately opposite the window? A. I think that would be fair.

Q. How would you describe—first, let's assume a following wind—let's assume the situation where the Stephens

is heading from Eugene Island Light to Beacon Seven. You have made that run; you know that course? A. Yes.

Q. And that course is approximately what? A. Oh, between 210 and 212 degrees true.

Q. Allright, now, then, assume that you have a wind from the northeast, thirty to forty miles per hour and that you have at that time, a two to three foot wind wave from the northeast— A. Yes, sir.

Q. And you also have a one to two foot ground swell from the southeast. A. Yes, sir.

Q. Now, if the Stephens were proceeding at half speed under those conditions, in your opinion, would it take water over the bow? A. No, sir.

Q. Would there be spray over the bow which would strike at or near the window that we have been discussing? A. No material spray, no, sir:

Q. Now, does that mean, no material—is that much or little? A. No, I would say that if you stood out on the deck as far as much as an hour, you might get your clothes damp.

Q. Now, that is on the weather deck itself? A. Yes.

Q. Outside of any canopy, outside of any cover whatever? A. Yes, sir.

Q. That is the amount of spray that you would have, in your opinion? A. Yes, sir.

Q. Now, then, as Mr. Mandell has earlier pointed out, if the boat were operating in the other direction, directly opposite, would you get spray and water of greater amounts? A. You would have water in greater amounts, but still it would be inconsequential on the Stephens.

Q. You do not believe that under those circumstances that your water would be in large amounts, if instead of the example given here now, the Stephens were to be operated exactly in reverse, 180 degrees back headed into the wind? A. No, sir.

Q. Now, do you think under those circumstances that would be enough water to get on those windows and make it leak enough to get water inside and to get on the steps? A. No, sir, I don't think so.

Q. Now, does it make any difference in your answer whether or not these winds are twenty-five to thirty miles per hour or thirty to forty miles per hour? A. No,

I think, in my answer, wind velocity has very little to do with it. It would be the size of the sea.

Q. Are you also familiar with the drilling barges which are used? A. Yes, sir, very familiar.

Q. Do you work on them, yourself now? A. I have spent a good many times the last three years aboard them, yes, sir.

Q. Overnight and for days at a time? A. One period I was out thirty-eight or forty-two days.

Q. Describe the condition of those vessels with reference to where oil and mud is allowed to accumulate. A. The way the vessels are constructed, they were originally a barge built for the Navy to use for storage in the Pacific. In the forward end—they are about 260 feet long—and they are 48 feet wide. In the forward end of these barges, we have a galley, a lounge and quarters built, quarters being on three different levels down in the barge itself; on the main deck of the barge and then we have a superstructure itself, built up above the barge. And for the forward third of that barge, it is all in quarters. Now, in that area it is clear, it is very clean. There is a janitor that works continually keeping those quarters clean and the passageway clean.

562 Q. Is that as clean a condition as you would find in your home? A. I would say it would be as clean as you would find in your home, unless your wife was a bug on it.

Q. Now, continue. A. After that, we have a drilling barge where we have to store drilling mud, which is a finely ground powder and cement which you also know as a powder and it is stacked in sacks on the main deck inside of the deckhouse. Going further back, we come to our liquid mud area where we have pits or tanks with liquid drilling mud flowing and it is dirty stuff if it gets on you. It is just a lot of waste material held in suspension in the water. It also has a certain amount of Diesel oil in it and has a certain amount of chemicals in it. And we have some machinery that pumps that drilling fluid. They are pretty big pumps; they handle a good deal of mud, a great quantity under pretty high pressure and it takes two five hundred horse power engines to drive those pumps. Also in that area, we have an evaporator for making fresh water out of sea water. Then we have a bulkhead and aft of that bulkhead, we have our generating room where our

563 electric generators are and that is clean back there.

It is just as clean as this courtroom here, but in that area from the mud room, where we have this dry storage, it is dusty in there, you can't help it from being dusty, and from the bulkhead between that dry storage and liquid mud storage and mud pump, it is generally wet. There is generally water sloshing on the deck or on the floor and occasionally you will get a film of oil on that water in there.

Q. Now, then, in transferring one drilling crew and relieving one drilling crew onboard the crew boat, one barge has how many in the drilling crew? A: ~~There~~ are twelve men in a drilling crew on a barge at a time. Six men work nights and six men work days.

Q. Now, what is their custom, what do they do with reference to their clothing before they come onboard the Stephens? A. The drilling crews work of course on a platform back of where the drilling barge is moored. That is where the deck and everything else is up there. We have a ramp that comes down to the back of the barge. Coming off tour, as in the oil fields they would say it, they come down the ramp, they will go down below in that after part of the barge and take off their dirty clothes, and they gen-

erally have—sometimes they walk barefooted, mostly 564 in their work shoes. They walk forward to the pump

room and the mud room up to the quarters, at that point, they generally take off their muddy old shoes or they wipe them. There is a series of wiping mats and they walk right up to the showers. The shower is the first thing that they come to coming in, and they generally drop those dirty clothes there in the passageway and go in and take their shower and get cleaned up, then go into their state-room and put on their clothes which they wear when they are off duty, clean clothes and street-type shoes, so they leave all of their dirty clothes and shoes back.

Q. Do they have to wear a particular kind of shoe when they are on duty? A. Yes, when they are at work, they require the men to wear a safety type shoe, that is a shoe with a tap over the toe and generally because there is a lot of dirt and mud around the drilling rig, they wear high-top shoes.

Q. Do they have places to stow that when they are off duty, on shore? Do they have places to store that on board

the barge? A. They leave their drilling clothes on the drilling barge. They don't transfer them back and forth.

Q. What is the condition of the weather deck upon which you would disembark coming, making a landing from a

boat such as the Stephens, the weather deck of the barge? A. The weather deck of the barge is out-

side of that deck house. As I explained, all of this machinery and storage—it is about four or four and a half feet wide and it is exposed to the sea and it is pretty continually covered by salt water and spray, and it is the duty of the barge captain on there and his crew to keep it washed down, if any kind of dirt collects on it. It is generally wet but it is generally clean.

Q. Is oil or grease allowed to accumulate there? A. If it ever gets on there, it is not allowed to stay.

Q. And it is the duty of some of the housekeepers on the barge to keep that place clean from accumulations of oil, grease, or other slippery substances? A. Yes, they have the same kind of instructions, the boat crews do, about cleanliness.

Q. And do they actually clean that space? A. Well, from personal observation, I would say that they keep after those particular places pretty thoroughly.

Q. Now, then, does the Stephens as a crew boat or other crew boats operated out there, ever have on board anyone other than employees of the Magnolia Petroleum Company? A. Occasionally it does, yes, sir. We transfer what we call Service Company personnel.

Q. That would be Schlumberger? A. Schlumberger, Halliburton, Directional drilling people, fishing tog
566 business people, and occasionally we will have guests, officials of the Company or from other companies or people who are allied with the Oil Industry, ride out on the boats.

Q. Do you have many or a few visitors? A. We have a great many visitors. It seems that our operation is unique and we have a lot of people who like to observe what is going on. Let me say one other thing. They are official visitors. If somebody would come to our Yard just off the street and ask to go out, they would be refused.

Q. Do you have an opinion as to whether or not it is impossible in the type of sea that we have discussed here and the example which was given here, whether or not there

was sea water which had weeped i around your windows and had gotten down on the top step of the ladder? A. Let me predicate it, I was not there.

Q. Yes, sir, I am asking you for an opinion. A. It is my opinion that water could not have come through those windows and leaked down on the top step.

Q. Now, then, is there any source of oil near that step on the boat itself? A. There would be two sources of oil or petroleum products on that boat that I can think of.

Q. What are they? A. One would be in the engine room, especially in the bilge. Knowing Mack, I am sure there was none on the engines or on the floor-space.

Q. Now, what is the bilge of the boat, I don't believe anybody has told us. A. The bilge of the boat is that portion of the boat in the lowest part of the hull above which the walkways and machinery is mounted. You generally have a certain amount of drip from various pumps, oil, water or salt water, whatever dirt accumulates, generally is washed down into the bilge. If you have anything to do with the sea at all, you have certainly heard the term "pumping bilges". That means getting rid of the dirty water and oil and refuse and so forth. The other source could have been from the tiller cable, which we lubricate pretty highly. It is supposed to preserve it and also to make it limber. Now, that tiller cable goes through the bulkhead at the extreme outside of the boat underneath these two windows that we talked about, underneath but outboard from them.

Q. The tiller cable is completely enclosed alongside the ladder in that space, is it not? A. Well, remember that ladder has two steps that protrude beyond that bulkhead.

Q. I show you Plaintiff's Exhibit No. 11, and ask you to point out there, the tiller cable, if you can. A. The 568 tiller cable runs open from this point forward through the next bulkhead and aft down alongside of the engineroom to the stern. But from this point, it goes through a stuffing box there. It's about this big, to hold the cable, it's about as big as your finger. From that it is covered in the engineroom. For the grease to have gotten on these steps, it would have had to fall inboard out like that and it might have gotten here, but it is, highly im-

probable. It probably would have dripped some place in this area here.

Q. Now, then, what do you lubricate that with? A. Heavy water-proof type sticky grease.

Q. Not a lubricating oil of any kind? A. No, sir, lab oil wouldn't stay there.

Q. What color is that grease? A. Very dark, almost black grease.

(Recess until Thursday, March 10, 1955 at 9:30 a.m.)

569 Q. Mr. Bolton: Now, Mr. Rhodes, yesterday when I inquired about when Mr. McAllister first told you he had received an injury, it has been called to my attention that the date which you gave then was within a day or two after October the 19th, 1951, is that what you intended to answer? A. Well, I intended to say that I was notified the same day or the day after that Mack said he slipped.

Q. Yes, sir. So that was 1950. A. That is correct.

Q. Instead of saying 1951? A. Yes.

Q. Now, Mr. Rhodes, I hand you Defendant's Exhibit No. 2, and I will ask you if you can tell us what this long portion of metal is. A. I believe this is the tread of the top step that came off of the J. C. Stephens. I do know that the step tread that is on the boat now, is different.

Q. And has only one tread been removed? A. Yes, to the best of my knowledge, only one tread has ever been removed from that top step.

Q. Now, Mr. Rhodes, you were here in the courtroom on Tuesday when Mr. McAllister wet the step down, were you not? A. Yes, sir.

570 Q. And you know about how wet he demonstrated that to be at that time? A. I believe that he put a light film of water over the entire tread.

Q. Now, do you have an opinion as to the effect of that water on that tread?

A. Mr. Mandell: Your Honor; we object to that, because the witness is not qualified to answer that question.

The Court: I sustain the objection.

Q. Mr. Bolton: Have you walked on similar surfaces with water on them, surfaces of that tread design? A. I walked on this particular tread, both of that ladder and

several ladders constructed of the same type of material.

Q. Have you walked on them during the time after they had been washed down when they were wet? A. Yes, I have.

Q. Did in your opinion, that affect the slippery ness of the step as you walked on it?

Mr. Mandell: I object to that, Your Honor, for the same reason as before. It would be a conclusion of this witness and he is not qualified to pass on that.

The Court: Overruled.

Mr. Mandell: Note our exception.

A. In my opinion, water does not affect the slippery ness of the step.

571 Mr. Mandell: We object to the answer as not responsive. He asked about what he did, how it affected him.

The Court: I sustain the objection.

Q. Mr. Bolton: Well, when you went up and down the step, did it affect the grip of your shoe upon the step?

A. As I recall, it had no appreciable difference wet or dry.

Q. You have been up and down the ladder in question on the Stephens on many times, have you not? A. Yes, sir.

Q. Hundreds of times? A. I would say in that neighborhood, yes.

Q. Do you know how you and how others stepping onto the top step of the ladder, step?

Mr. Mandell: If it please the Court, I have no objection to him asking him how he did it, but as to asking at this stage of the proceedings, what others did; I don't think it is admissible.

Mr. Bolton: Alright, I will withdraw it.

Q. Now, then, do you step from the landing on the deck level to the first step of the ladder—how do you face? A. I generally face going down the ladder.

Q. That is facing forward? A. Yes, sir.

572 Q. Do you use the handrail? A. Yes, I always use the handrail and I always look for a grab rail at the top of each ladder.

Q. And there is a grab rail at the top of this ladder? A. Yes, sir.

Q. Now, then, which hand do you grab the handrail with? A. The failing on the left side—I would use my left hand.

Q. How about this particular rail? A. Well, the rail is

on the lefthand side of the passageway as you go down, I would use my left hand.

Q. Now, then, in doing that, how do you place your foot? A. I attempt to get as much of my foot on the tread as I can.

Q. Does that require you to slightly turn your foot outboard? A. Yes, sir, I would say that your foot would strike that tread in an oblique position or slightly oblique to it.

Q. With the toe pointed in which direction? A. Well, that would depend upon which foot you hit it with first.

Q. Well, if you step with your right foot? A. If you step with the right foot, your toe would be pointed inward to your body or to your left hand.

Q. When you step in that manner, is the hand rail readily available and within reach? A. Well—

Q. On the lefthand side and with your left hand. A. As I remember the boat, that is correct.

Q. And when you make that step, what part of your shoe is placed in contact with the step, of the tread? A. The toe and ball of the shoe meets the tread first.

Q. In somewhat the manner in which I have my foot placed upon this step? A. Essentially that way, yes, sir.

OFFER IN EVIDENCE

Q. At this time, we offer in evidence, Defendant's Exhibit No. 2, that portion thereof, except the new part of the tread, the small section. We offer the long section of the tread.

The Court: Allright, it will be admitted.

Q. Mr. Bolton: Now, Mr. Rhodes, I hand you what you have previously identified as being the Log of the vessel, Stephens, covering the period including October 19th, 1950. I will ask you whether that also includes the entry for the vessel on Monday, October 23rd, 1950? A. Yes, sir, it does.

Q. I will ask you to read from the Log what occurred, according to the Log at 10:15 on that page 65 of the Log. A. October 23rd, 1950.

Q. That appears on page 65 of the Log.
574 Mr. Mandell: If the Court please, I don't see the materiality as to what occurred especially in view of the entry that is in there by notice on the 20th day of October, twenty-four hours or more after this incident.

Mr. Bolton: It is approximately three days later.

Mr. Mandell: Three days later, yes, sir.

The Court: I suggest that all of it from the 19th through the 23rd, be admitted, if there is any question about it.

Mr. Bolton: Then, I offer all of the Log entries through Monday, October 23rd, at 23:20 in the evening.

Mr. Mandell: I have looked at the 20, 23rd, and the 22nd, and I see nothing in there that is of any material nature.

The Court: I overrule the objection.

Mr. Mandell: Note our exception.

Q: Mr. Bolton: Will you please read the log entries in the Log beginning with Friday, October the 20th and continuing day by day and hour by hour as the entries appear through the last entry under Sunday, October 22nd, the entries beginning October the 19th. A. Yes, sir. (Reading Defendant's Exhibit No. 22.)

Q. Now, Mr. Rhodes, the time kept there are in twenty-four hour periods. That is, they start at zero, zero, which is midnight and run to 2400, which is midnight the following day? A. Yes, sir.

Q. Is that correct? A. That is correct.

Q. And the time is kept in local time, rather than in Greenwich time, as the Navy keeps it, is that correct? A. Yes, and it is kept in local time, which is Central Standard Time.

Q. That is the same time zone that we are in here? A. Yes, sir.

Q. Now, the Coast Guard in that area, as in other areas, at infrequent intervals and without notice, will stop the vessel and make inspections? A. Yes, the Coast Guard is empowered by law to do that any time that they so desire.

Q. And do they, from time to time stop your vessels? A. They have from time to time over the past year.

Q. Is that the entry that you read on 10-15 on the 22nd, does that indicate such inspection? A. Yes, sir, it does.

576 Cross Examination

By Mr. Mandell:

Q. You were not present at the time, were you Sir, when the Coast Guard was supposed to have come in there on the 23rd? A. No, I was not aboard the vessel.

Q. You don't know whether one, two or three persons from the Coast Guard came there? You don't know on that particular day what type of inspection they made? A. Only by what the crew told me.

Q. I mean what you know. A. No, sir, it would be hearsay.

Q. Alright. Now, you had Mr. McAllister work in your department, so to speak, the entire period of his employment with Magnolia Petroleum Company. A. With the exception of the last few months when I was transferred to a different shop, Mack was under my supervision, yes.

Q. During that time, you found him a very reliable employee? A. I would say that is a correct description, yes, sir.

Q. You found him trustworthy and whenever he said something to you, you relied on it? A. I did that.

Q. And you found that he kept his engineroom fairly clean? A. I would say Mack was above average in that respect.

Q. And you, as a matter of fact, did attempt to help him with his employer to try and get some hospitalization and medical attention for his back injury? A. I believe it is the duty of every foreman to help those who are working for him.

Q. Well, I don't question your duty. I say that you did do that? A. Yes, sir, I did do that.

Q. And you tried to get the employer to buy him a sacroiliac belt, which he bought on himself and it wore out and he had to buy another one. A. Mack asked me to see if I could get the Company to buy him one and that I did.

Q. But you were unable to do so? A. We were unsuccessful in our attempt.

Q. And you also attempted to try to make arrangements for some hospitalization; because of his back injury? A. I would like to phrase it just a little bit differently than that. We attempted to ask the Company to take cognizance of this particular accident, to give him what treatment they would consider would be required and they declined.

Q. And you yourself have seen—by the way, you did know, on the day that Mr. McAllister reported to you that he had slipped on wet steps, like it is written in the Log Book, and did you ask him at that time to fill out any.

578 other forms, on that day? A. As I remember it, sir, I knew about the accident the day that it happened or the day after. In my mind I am not sure. At that time I did discuss it with Mack. I knew about it, and I asked him if he had made an entry in the Log Book and he said that entry had been made.

Q. You deemed that sufficient, did you not? A. That was our procedure at the time for what we considered minor accidents.

Q. Of course at that time, neither you nor Mr. McAllister realized or had any reason to anticipate this result? A. No.

Q. Now, then, at a later date, you do know that Mr. McAllister filled out an accident report? A. Yes, I have seen that accident report.

Q. Which is in the Company's files? A. Yes, sir.

Q. And substantially saying the same thing that you read in the Log Book? A. I believe that report does say that, yes, sir.

Q. Now, when Mr. McAllister told you that he had slipped on wet steps, you had no reason at all to doubt it, knowing Mr. McAllister as you did. A. No, I had no reason to doubt it and didn't doubt it.

579 Q. And didn't doubt it? A. No, sir, I did not doubt it.

Q. And you finally know that after working for you—as his employer, until sometime in July 1953, his condition while attached to this vessel, became so—that he finally had to go to a hospital, and received a letter from the Company which entitled him to go the U. S. Public Health Service? A. I know that during that period of time, Mack's back bothered him. He complained about it and he eventually asked for treatment, and since he was a member of a vessel of the United States, we gave him a letter to the Marine Hospital.

Q. Then, from your knowledge, you do know that a disability developed or manifested itself with Mr. McAllister during the time that he was attached or a member of the crew of the J. C. Stephens? A. Yes, sir, that is correct.

Q. Mr. McAllister, having worked on the J. C. Stephens for quite some time knew, did he not, the employees of the Magnolia who worked on these barges? A. Yes, sir.

Q. And if you will look at Defendant's Exhibit No. 5, you can tell, can you not, that at five o'clock in the morning, of October 19th, 1950 when the J. C. Stephens went to the barge that was lying somewhere near the Beacon No. 7, or in that area, all that he picked up from there were employees of the Magnolia? A. I would assume that would be a correct answer, yes, sir.

Q. And some reference down below on this same defendant, Exhibit No. 5, where it says, "Sightseeing party". By looking at that exhibit, you can tell, can you not, that that sightseeing party did not board the vessel on the barge off of Beacon No. 7, at five o'clock in the morning? A. No, I would assume that that sightseeing entry referred to a trip they had later in the same day.

Q. Later in that same day? So from what you see there, you know, as a matter of fact, that the only people who were aboard the J. C. Stephens at five a m, or four a m, for that matter, from the time they left Eugene Island to Beacon No. 7, from Beacon No. 7, to wherever the barge lay, to pick up the men and back, were all employees of the Magnolia Petroleum Company. A. I believe that would be a fair assumption.

Q. Look at Defendant's Exhibit No. 4, which is a Master's Report, signed by the Master and the engineer,—ordinarily the top part about it, ordinarily this is filled out in part at least by the Master? A. Yes, the Master has certain items on it and the engineer has certain items, yes, sir.

581 Q. Now, the fact is that in these instances evidently Captain Dressel asked Mr. McAllister to fill some of these things in? A. I think if and when it is developed you will find that Mr. Dressel hadn't had a lot of formal schooling.

Q. Well, I didn't mean anything— A. Wait. And fellows that have worked with him in the paper work angle, have helped him take care of his paper work.

Q. I understand that and therefore insofar as what is entered in there, it is the Master's duty whether the entry is done at the direction of the Master? A. In this particular instance, I believe those items which are the Master's alone, would be covered under that. Those that are the responsibility of the engineer alone would be of his own volition.

Q. I am talking about those parts—that is the Master's duty? A. Yes, that is correct.

Q. Whatever the Master tells him to do, of course the Master has complete authority over the vessel? A. That is right.

Q. And you have knownⁿ shortly after the J. C. Stephens was first put into operation that there was some difficulty with the three port holes on the port side over this ladder? A. From time to time, the exact dates I can't recall.

Q. Of course you don't. A. The crew has reported to me that they have had some seeping and leaking in those ports.

Q. And attempts have been made by the crew and by some shore employees of the Magnolia Petroleum Company to do something about it? A. That's right.

Q. And every time something was done the report came back to you that there was still some leakage? A. No, I wouldn't say that. I would say that that is not correct.

Q. Didn't employees of the Magnolia Petroleum Company working on shore as well as onboard, from time to time continue to try to do something about stopping the leakage? A. I will say that there have been several times that we have worked on those windows in one way or another, yes.

Q. And the purpose of the work to stop the leak? A. That was one of them. I believe you find out that they were painted and screened.

Q. And that is really maintenance work? A. That is true and those items are what I would consider general maintenance work.

Q. But caulking material was obtained from time to time, trying to caulk the windows or the glass parts, or any part through which some leakage came through, in order to stop that leakage? A. I believe that is correct.

Q. So actually, the only difference between what you say the condition was with reference to the three port holes in question and what you heard Mr. McAllister testify is simply a matter of degree? A. I would say that is correct.

Q. I believe you say, testify, that at times you spend forty-some days on the drilling rigs themselves? A. I said,

at one particular time, I spent thirty-eight out of forty-two days outside, yes, sir.

Q. Was that after you became Superintendent? A. No, sir, that was while I was still Marine Foreman.

Q. Do you remember when that was? A. Yes, sir, very well.

Q. When? A. December of 1952 and January of 1953.

Q. I thought you told us—or at least my notes say, that you became Superintendent in May 1952? A. Well, I will put it this way,—that the years—I can tell you about the month of the year, but the year, as in my testimony yesterday—I could have missed that too.

Q. Well, I can understand that too, but can you 584 now tell us when you became Superintendent? A. I have been Superintendent two years.

Q. So it was 1953? A. Yes.

Q. Alright, now, then, while you were Marine Foreman, did you have occasion to make these trips to the barges or drilling rigs very often? A. Yes, I would say I was outside anywhere from once a week to once a month.

Q. And then you had as a part of your duty, to travel on these boats, including the J. C. Stephens, during the time that you were Marine Foreman, once a week or once a month? A. Yes, sir; I had that opportunity and it was a part of my job.

Q. I know, but I am talking about your duty. A. Yes, sir.

Q. Then, if you traveled once a month during those periods of time, of course you used one of the vessels that were then available? A. That's true.

Q. So during the period that you traveled once a month, the chances are one in six, that might not have used the J. C. Stephens, because you used whichever one was available? A. If you start out with that hypothesis, 585 your logic is correct.

Q. Well, is my hypothesis correct? A. No, I don't believe so, I kept no Log on my trips.

Q. So then you don't know? A. No, I would have no way to believe that what you say is true.

Q. Well, I don't know. All I know is what you told the jury yesterday. A. Yes, sir.

Q. But it is true that during the time that you were Marine Foreman, you had occasion to go to these rigs and

travel on one of these six boats, either once a week or once a month? A. I said it would be at an interval. It would average somewhere between once a week and once a month, I believe as I recall it, would be closer to once a week.

Q. Alright, let's assume that it was once a week, if you did it once a week, then, unless you went on the Stephens each time, the chances are that once every six weeks you would be on the Stephens? A. That I would have made a trip on it an average of once every six weeks, yes, sir, if your hypothesis is correct.

Q. Alright, then, since my hypothesis was taken from your testimony, then you did not mean to tell the jury yesterday that you were on the Stephens at least once a week traveling with her on to one of the locations 586 in the Gulf of Mexico? A. No, I did not make a trip once a week on the Stephens. That is correct.

Q. Alright. So, during the time that you traveled once a month, if it was a period of say, two or three months that you did that, then the time that you traveled on the Stephens during that period of time, was even longer than once a week? A. Yes, that would follow.

Q. That is true, isn't it? A. That would follow.

Q. So then, if I gained the impression from your testimony yesterday that you were on the Stephens once a week, then I was—and whoever on the jury felt like I did, that was an erroneous impression? A. If the jury got the impression that I traveled on the Stephens once a week and made a trip outside once a week, that would be wrong.

Q. Alright. Now, I believe you testified that you were an officer in the Navy? A. I was.

Q. In what department did you serve? A. I served in both Deck and Engineering.

587 Q. Deck and Engineering? A. Yes, sir.

Q. Alright, then, the Deck Officer as well as an Engineer Officer,—you were acquainted with the keeping books? A. Yes.

Q. And how they are supposed to be kept and while I understand the J. C. Stephens is a private operation, this Log Book hasn't been kept with the same adherence to form and rules like they are kept on larger vessels? A. No, they surely aren't.

Q. And many things that are generally put in Log Books, do not appear in this one? A. Well, I would say that

many of those embellishments, things that are incidental, that are not important, have been omitted from this Log Book. The essential things of what happened to the ship are in that book.

Q. Well, the question of importance or unimportance is something else. Many things have not been put in there?

A. That is true.

Q. Do you know that the barge to which the Stephens traveled during October 1950, was laying off the No. 7. Beacon; if you remember? A. Assuming what I read in the Log of the boat and what I just read to the jury, it went to two barges off of the No. 7. Beacon during that period.

Q. And isn't it true that there were about two and a half knots from the No. 7. Beacon to the barge that they went to, if you know? A. Not as a measure of speed, sir.

Q. Well, miles. A. Miles, I would say that would be a fair estimate of the distance that the barges were apart and could have been from Beacon 7.

Q. And wasn't that barge—I am very bad at geographical locations—but if you will follow me— A. Would you get the chart?

Q. Yes; thank you. This is No. 7. Beacon here? A. Yes.

Q. Where would that barge be? A. It said at or about No. 7. Beacon. I am sure the barges weren't on the inside, because the water is too shallow, it would not be safe to anchor them there, and the barges were evidently at anchor. I would say that if they were said that they were at No. 7. Beacon, which is what all of the Logs describe, that they would have been in this area right in here, anchored, and they probably would not have been anchored closer than a mile apart.

Q. Do you recall that they were about in the position where I have my pencil now? A. Oh, I would say that that would be too far.

Q. Right here! A. No, that is still too far. Say, 589 within a mile either side of the Beacon. If you use

Beacon 7, as the center of a circle, a mile or a mile and a half in radius, you would find, I am sure, the area that those barges were anchored.

Q. Well, was I mistaken when I thought that you stated that they were about two and a half miles away? A. Well,

that is somewhere in the vicinity, I would say not any farther than that and probably closer.

Q. If they were, say, two miles away, a little bit more to the east;— A. Alright.

Q. And if the vessel, by necessity, had to head in that direction in order to get there, wouldn't it? A. It surely would.

Q. And in which event the port side of the vessel would be exposed to the northeast, would it not? A. If the barge was at that location, the vessel would have to present its port side to the northeast.

Q. And if the vessel was proceeding in such a manner that the port side was exposed to the northeast, and if there was a northeast wind blowing either twenty-five or thirty miles per hour or thirty to forty miles per hour, and the sea was declared by the Coast Guard to be rough, then the sea would be hitting the port side of the
590 Stephens when she was going in that direction? A.

Yes, sir, that is correct.

Q. And of course, if that be true, either the sea or the spray depending on the velocity of the wind or the height of the waves, would then have the likelihood of hitting over the area where the port holes are, either the sea itself or at least the spray? A. Well, following the hypothesis that you have set forth, this side of the ship would undoubtedly become damp.

Q. And if the vessel after picking up its employees from that barge, would go back toward Morgan City, it would be heading into the northeast wind? A. Yes, provided that barge is at the same place you have placed it.

Q. Yes. A. Then it would present its starboard side to the wind until it go to Beacon 7. Then it would head in the general direction of the bow on—

Q. That's right, after reaching No. 7, it would follow the same route? A. Yes, sir.

Q. And would go on from No. 7 to Morgan City, it would be heading straight into the northeast wind? A. Essentially, yes, you would be going north or northeast.

591 Q. The same employees who were employed on board the vessel on October 19th, 1950, sometime prior to that time or shortly sometime thereafter, are still employed by the Magnolia Petroleum Company with the exception of Mr. McAllister? A. That is correct; they are.

Q. So that all the people who may have knowledge or should have knowledge of the situation that existed in that area are still available in the employ of the employer at the present time? A. Those members of the boat crew, certainly they are.

Q. They consist of Captain Dressel, Captain Rosson? A. Yes.

Q. Mr. Ashton, the deckhand? A. Yes, sir.

Q. And the other deckhand was who? A. I don't remember exactly.

Q. Mr. Liskey? A. I believe Mr. Liskey is still in our employ.

Q. So they are all available if necessary for any purpose whatsoever? A. Oh, all except Mr. Liskey. I can't be sure of his availability.

Q. The Stephens had a three member crew on it? A. Yes, sir.

592 Q. One was the Master? A. That's true.

Q. And he had general charge of the vessel with particular attention to navigation and the upper deck? A. That is correct.

Q. And the next was the engineer who had charge of the engineroom and its operation and things of that nature? A. That is correct.

Q. And in some manner on a small boat assisting the Master was the deckhand? A. That's correct, yes.

Q. With reference to the deck department? A. All departments.

Q. Of course the engineer can call on the deckhand to give him some help? A. That's right.

Q. But primarily he was a deckhand, primarily speaking, and had charge of the deck under the control of the Master? A. He didn't have charge of anything. The deckhand on a small vessel like that is the third man. He is a utility man, you use him almost any way. He didn't have a whole lot of responsibility.

Q. He had to do what he was told? A. That's right.

Q. And one of the things that he was told to do at all times, was, insofar as the deck was concerned, insofar as the galley is concerned,—the steps leading to and from the galley, the steps leading from the lounge up to the wheelhouse, was his job to sweep them, clean them and keep them clean? A. Well, my instructions

593

to the Captains were to keep the vessels clean, and Captain Dressel may or may not have issued instructions to Mr. Ashton in that detail. I don't know that.

Q. Alright. If Mr. McAllister received some severe pain in his back as he slipped and fell down those steps, and Mr. Ashton was there with him, and water and oil film was discovered there, on top there, then, and if the man who was injured himself, had some pain so that he had to get some relief and get back to his engineroom also, and Mr. Ashton was there, then Mr. Ashton was the man to clean those steps?

Mr. Bolton: Just a minute; Your Honor. If the Court please, I am going to object to that. That is outside the knowledge of this man. It is argumentative. The evidence already shows what the situation was.

Mr. Mandell: It is cross examination, Your Honor, and this is the man that they put in charge of all of these developments.

Mr. Bolton: It is cross examination, Your Honor,
594 but there hasn't been anything brought out by this witness on direct examination concerning any of these events on that date, because he was not there.

The Court: Objection overruled.

Mr. Bolton: Note our exception.

Q. Mr. Mandell: That is true, isn't it, that Mr. Ashton was there, if necessary he could take a rag and clean that step, that was expected of him to do, was it not? A. I would say he was available. Whether he was expected or not, that is something else; that is carrying your reasoning a little far.

Q. Alright. You know Mr. Ashton and I don't. Now, then, walking down these steps from the lounge into the galley, to begin with, the step itself as it exists on that particular vessel, is wider than we have here in Defendant's Exhibit No. 2, because it has a lip, a rounded out lip? A. I would say that it is just slightly wider than that, yes, sir.

Q. And you say you do not remember whether he walked down with his right foot or his left foot, but if you put your right foot down, you think you might put your foot in some sideways position, with the toe looking a little bit to the port side, is that what you told Mr. Bolton? A. I

told Mr. Bolton that I would try to get as much of
595 my foot on that tread as I could.

Q. And if you will recall, the handrail is just a little bit lower than the first platform before you put your foot on the steps? A. That's correct.

Q. So you hold on to it this way and that is an aluminum handrail? A. Yes, sir.

Q. About this way? A. It is in constant use.

Q. And then you put your foot down about like this, don't you? A. I said that if I had started down with my right foot, I would have turned it that way.

Q. Then you would bring your next foot down on the step below? A. That is right. It is an awkward situation.

Q. Yes, sir, and then as you go down further, if the vessel was pitching and rolling, you would reach for the grabrail? A. Yes.

Q. Now, it is only after you put your foot on the second or third or fourth step, I believe, that's when you put your hand on the grabrail? A. Yes, you are not able unless 596 you would fall forward, you can't grab the rail from the top.

Q. You cannot grab the rail from the top step, it's not designed that way? A. No, sir.

Q. And by the way, you testified that you always walked down looking forward? A. I would say generally I go down that way.

Q. Yes, sir. If you were to back down, you couldn't possibly reach the grab rail? A. No, sir.

Q. So the vessel is so designed that as you walk down the first two or three steps you hold onto the rail that is on the port side of the vessel? A. Yes, sir.

Q. And as you get down further down, depending on if the vessel is pitching and rolling, then you grab hold of the grabrail, is that correct? A. It is there for you to grab hold of.

Q. And oftentimes this isn't done unless the vessel is in pretty rough water? A. I think that all depends upon the habits of the man going up and down the ladder.

Q. Well, I am speaking now of a person who exercised ordinary care for his safety—

Mr. Bolton: I object to that, Your Honor, as calling for a conclusion of the witness.

The Court: Objection sustained.

Q. Mr. Mandell: Never mind. You say that is up to the individual? A. If I can explain it this way, what I would consider safe for myself is going to be different than Mack would consider, say for himself. It is all a matter of habit. Mack testified that he stepped through a door and wiped his feet. Some people do and some people don't, it all depends on how their wife gets on them at home. I say the same thing holds on whether you make a grab for that rail. Personally, I look for it.

Q. You said something to us about the barge, the drilling barges; and you described it somewhat in detail. Now, let's assume for argument's sake,—assume with me that this is the drilling barge. A. Alright.

Q. And this is the forward edge of the barge? A. Yes, sir.

Q. The galley storage quarters is up here, is it not?

Mr. Bolton: May I suggest this. If you will ask him to assume Barge No. 6, you will have the exact barge.

Mr. Mandell: Alright. Say, barge No. 6.

Q. Is the galley, storage and hot water up front?

598 A. We have a hot water heating unit much like you have in your home, up front. Then on the lower deck, slightly back on the port side, we have the boiler room also.

Q. Then immediately back of that, you have the galley?

A. In the four feet, we have storage, refrigeration equipment; right there we have a galley which goes athwartship with an icebox in each end, a freezer on one side and the icebox on the other. Moving back from that, we will have a lounge area on the port side, and we have two tables, at which I think you can seat eight men on the starboard side where the crew met.

Q. You mean, to eat? A. Yes.

Q. Do you also have coffee time there? A. Around in that area, yes, sir.

Q. People come for a coffee break?

The Court: Gentlemen, I think we are going a little far afield. Let's try to confine it to the matters in hand.

Mr. Mandell: If Your Honor, please, I don't believe it is too far afield.

The Court: Well, insofar as it is relevant to the case, let's confine it to that.

Q. Mr. Mandell: And when they come down for their coffee time, they only have about ten or fifteen min-

599 nutes, do they not? A. I think I see what you are driving at. Let me explain it.

Q. I am not driving at anything. Just answer the question.

The Court: Just answer the question.

Mr. Bolton: I object, Your Honor, to him asking that question, unless he first establishes that there is a coffee break.

The Court: Objection overruled.

Mr. Bolton: Note our exception.

Q. Mr. Mandell: How much time do they spend generally? A. Who? There are three different crews.

Q. The members of the crew who work on that barge or on that drilling rig. A. I would say that from time to time, a member of the crew will come into the galley to get a cup of coffee.

Q. He wouldn't change his clothes for that time, would he? A. No, sir.

Q. So he would have to walk from back here where there is a mud storage and mud mixing and all the matters that you testified about yesterday, and walk forward and come in to get his coffee? A. Not necessarily.

Q. Well, sometimes? A. It is possible, yes, sir.

600 Q. And they also have their lunch up front here, don't they? A. That is correct.

Q. They don't change their clothes for eating lunch, do they? A. No, sir.

Q. So that all of this area that you have testified to about yesterday, is used by the men while they are in their working clothes, in their working shoes, for the purpose of coming to each other coffee? A. That's correct.

Q. Then also, I believe you have a shower place for them to shower? A. Yes, sir.

Q. And I believe there is room for four of them to shower at one time? A. I believe that is correct, essentially.

Q. And you have got about eight or ten men? A. There are six men on the drilling crew.

Q. And— A. Five men on—

Q. Well, anyway there are more than four? A. Yes, sir, there are more than four.

Q. Is it not true and haven't you observed that when these six men quit work, four of them go to the shower,

601 While the others go to their quarters back here taking off their clothing and waiting until the shower got available and then go and take their shower? A. That would follow.

Q. And therefore during that period of time, they use their working clothes and working shoes to walk over in that area; that's true, isn't it? A. That all depends upon the fellows involved. As I told you yesterday, some of them take their clothes off before they come up into that area. They change clothes in the after end.

Q. What do they do with their clothes? A. They just leave them back there. They come up in all states of undress.

Q. I see. Now, you say some of them will take off their clothes and leave them back there and some come to their quarters? A. That's right.

Q. So the fact remains that members of the drilling rig or this barge, who are in their work clothes naturally covered with mud and oil and grease mixed with that drilling mud will from time to time walk over that area and come and eat or drink coffee or change their clothes or eat their lunch or something? A. That's right, yes, sir.

602 Q. And those are the same men who are being transported by the J. C. Stephens back to Morgan City? A. That's correct.

Re Direct Examination

By Mr. Bolton:

Q. You have testified about the occasion of your attempting to get the Company to gear some expense for Mr. McAllister in connection with a sacro iliac belt. Now, was that or not several months or possibly a year or more after October 19th, 1950? A. I believe that was a year after.

Q. Alright, sir. And the other occasion that you testified about attempting to present his problem to the Company, was that or not later even than the first occasion? A. I believe that was in the winter and Spring of 1953.

Q. That is well over two years after the event? A. Yes, sir.

Q: Now, then, in regard to this matter, of course you did not keep up with and you cannot now, about each of your vessels as to time? A. No.

Q. Now, due to naut maintenance which all vessels 603 undergo at all times, include caulking, painting, shipping; changing of gaskets, anything of that nature that were necessary as it appeared to be necessary at the time? A. I would say that constituted ordinary maintenance, yes, sir.

Q. Now, then, I believe Mr. Mandell asked you if the only difference between your testimony and Mr. McAllister's was a matter of degree? A. Yes.

Q. Now, then, I will ask you whether or not, do you mean by that that your opinion has changed any with reference to the type of seas that were necessary to come against these windows we have been talking about? A. No, my opinion has not changed in that respect.

Q. Do you recall the hypothesis that Mr. Mandell gave you with assumed location of barge No. 6? A. Yes.

Q. Under those conditions as he assumed, do you think that there would be enough water against those windows to get water on the top step? A. No, I don't.

Q. Alright, sir. Now, in addition to making trips out on the Stephens, did you make inspection visits on other occasions? A. I believe I can state safely that I was probably aboard the J. C. Stephens every day that 604 it was docked in town.

Q. And that is at frequent intervals? A. We worked seven days a week.

Q. And in addition to making trips on the Stephens out into the Gulf, did you use it on other occasions? He inquired about the trips to the Gulf and rigs, I believe. A. I would say that covered the times that I made trips on it.

Q. Yes, sir. A. But as far as being on the boat while I was Marine Foreman, I was on it almost every day.

Q. Now, then, when you did make trips out to the rig, did you have any preference as to the boat you went off? A. Yes, sir, I would much rather go on the Stephens.

Q. Is that the most stable boat and the largest crew boat and the best riding crew boat? A. We considered the Stephens the Queen of the Fleet, yes, sir.

Q. Is that the boat that you used when you had very important persons in the Company down there? A. When

the Stephens was delivered to us, we were given to understand that it had been built with the idea in mind for carrying very high officials of our Company during their inspection trips of the operation. While we were to use it in a routine way for transporting drilling crews, and barge crews, yet it was to be kept more as a yacht than it was as a work boat.

Q. And did you keep it that way? A. We have.

Q. To the best of your ability? A. We have as best we could, yes, sir.

Q. Now, then, some inquiry was made about your previous experience: Are you a qualified deck officer? A. I am qualified both as crew deck and engineering and also submarine.

Q. Are you qualified for command at this time? A. I am not qualified for command, no, sir.

Q. Now, then, Mr. Rhodes, with reference to the Log Book and the comparison with the Navy Log Book, the Navy Log Book shows when crews change, does it not? A. It does.

Q. Shows weather observation? A. Yes.

Q. Position? A. Yes.

Q. Leave and liberty parties? A. Yes, sir.

Q. Detailed supply information? A. Yes, sir.

606 Q. Whenever the boat went to general quarters or had a drill of any kind? A. Yes, sir.

Q. The course of the vessel was on, and its speed? A. Each and every one.

Q. All of that went into the Navy Log? A. Yes, sir.

Q. And other data as well? A. Much other data.

Q. They had a man in the Navy who kept the Log regularly, a rated quartermaster, didn't they? A. He kept the Rough Log, yes, sir.

Q. He kept the rough log. Now, then, did you find that that information was necessary in your fleet operations?

A. No, a private company cannot operate like the Navy does.

Q. Did you obtain and have entered into the Log and on these reports you have testified about, all of the information that you felt was necessary for your operation? A. Not only all that I felt was necessary, but all that was felt necessary by other officials of our Company, yes, sir.

Q. Your Log does show the particular mission of the boat, where it went, what it was doing and who was aboard.

in general, does it not? A. I will put it this way.
607 The Log enables us to reconstruct the movements
and happenings aboard the vessel.

Q. When you talked about the drilling barge a minute
ago, the operations that you described, were those usual
when the drilling barge was on location, was it not? A.
Yes, sir.

Q. Was this drilling barge, No. 6, on location? A. It
was not.

Q. Now, then, do they serve meals on the drilling barge
at five a m? A. Yes, sir.

Q. When it is on location? A. Yes, sir, when it is on
location.

Q. Do they serve at that hour when it is not on location?
A. I will explain it this way. The crews on a drilling
barge work from six to six, six in the morning until six
at night, and six at night to six in the morning. The on-
coming crews have to eat before they go on duty.

Q. Yes, sir. A. Which would make their approximate
breakfast time for the on-coming crew somewhere be-
tween four-thirty and five-fifteen, that's the barge crew,
the maintenance crew, the seamen on the barge as distin-
guished from the drilling crew and also the drilling
crew.

608. Q. Do they change at the same time? A. Yes, sir.

Q. But if the barge was not on location, did it
have the same crew aboard? A. They don't change their
tour arrangement when the barge leaves location.

Q. When they do change, is it the oncoming crew that
eats breakfast around five o'clock first? A. Let me put it
this way. On crew change day, the schedule gets slightly
disarranged. Naturally the fellows have been out a week
and they are in a hurry to get home and they want that
boat to get away just as soon as they can, and they gener-
ally make arrangements between crews to be relieved a
little early, so on change day, the night crew, which in this
case was the one that was coming in, would probably be
relieved in the neighborhood of four o'clock. In those
instances, if work permits, the crew will get up and go
directly onto the job at four o'clock and after they get
started, they can be relieved, one or two at a time. They
will come down and eat breakfast subsequent to going to
work. The oncoming crew though—I mean the offcoming

crew, would get through, clean up, eat breakfast, then go out and get aboard and head to town.

609 Re Cross Examination

By Mr. Mandell:

Q. Well, Mr. Rhodes, as a matter of fact, in some instances in this very Log Book, you have got notices there at one time that they were standing by Block 72 with a northwest wind at fifty miles per hour. So sometimes depending on what the Master wants to do, you put down the weather? A. Sometimes. May I give my explanation of that?

Q. Well, do you know whether they put it down or not? A. If it is an unusual situation they put it down.

Q. And in order to get water on this top step on any part of the step, you have water on some of the lower steps or on the deck, then that water can be tracked up to the top step, can it? A. I would say that that is a possibility.

Q. So, if water leaked through those port holes and got onto some steps and people used those steps, then the water would be tracked onto the top step? A. If there was enough tracking, it could.

Q. Now, you also know, do you not, sir, as a Marine Foreman, of the Magnolia Petroleum Company in charge of these boats that a number of other people have slipped from these steps and injured themselves? A. No,

sir, I would say that is an incorrect statement.

610 Q. Well, you look at these Log Books, don't you?

A. Yes, sir.

Q. And the Log Book reflects that other employees
Mr. Bolton: If the Court please, I am going to object to that. The Log Book itself would be the best evidence.

Mr. Mandell: I will show it to him.

Mr. Bolton: The question is directed at these steps, isn't it, Mr. Mandell?

Mr. Mandell: The step is on the

Mr. Bolton: The steps leading to the galley?

Mr. Mandell: I don't know. If they are steps, I will let him see it. Let's look at January 1951.

A. Alright.

Q. Isn't it reported there that one of the employees slipped on the step? A. No, sir. It says—shall I read it?

Q. Sure. A. "Burke V. Ashton bruised right lower leg while descending ladder in forward hold."

Q. Lower hold or forward hold? A. It says forward hold.

Q. Allright. Now, those steps are the same kind of steps? A. No, sir, that is a vertical ladder much like you use in your house, except that it is constructed out of 6 ft. steel.

Q. I see. What about looking at the March 5, 1951? A. I will read that, too.—"John Pullin slipped on ladder between wheelhouse and lounge, cut left knee on knee cap."

Q. Those steps are made of the same material, aren't they? A. I believe we have pictures that might refresh my memory.

Q. You don't remember now? A. No, I don't remember that.

Q. If you will look at a picture, you will find that they are.

Mr. Bolton: I think that's right.

Q. Mr. Mandell: So one of the duties of the Master and including the owners and operators of the vessel is to make those steps safe and to keep anything from them that may cause a man to slip on them, that's true, isn't it? A. I believe, generally speaking, that is a correct statement.

Q. And we know on October 19th, when this Mr. McAllister made the report to you—did you go to look at the steps? Do you remember whether you did that or not? A. That I can't remember.

612. FERDINAND B. DRESSEL, a witness produced by the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Bolton:

Q. Your name is Ferdinand B. Dressel? A. Yes, sir.
Q. And you live in Morgan City, Louisiana? A. Yes, sir.
Q. Will you speak out loud, please? By whom are you employed? A. Magnolia Petroleum Company.

Q. And how long have you been employed by Magnolia Petroleum Company? A. Since 1948.

Q. 1948? A. Yes, sir.

Q. And before that time, what work did you do? A. I was boating.

Q. Out and around Morgan City? A. Around Morgan City in inland waters.

Q. And how long have you been doing that kind of work? A. I have been doing that kind of work since 1938, with the exception of three years that I worked with the Texas Company as a roust-a-bout.

Q. Has your home always been in and around Morgan City there? A. No, I was raised out in the country, but moved into Berwick about in 1921.

Q. How old are you? A. Forty-eight.

Q. Now, Berwick is located directly across the Atchafalaya River from Morgan City, is it not? A. That is right, sir.

Q. Just a bridge between them, and the river? A. That's right.

Q. You were alternate Captain; and by Alternate Captain, I mean there are two persons who are, doing the time they are on board, in command of the seamen, is that right? A. Yes, sir, one would be in command while he is on.

Q. And you had that position on the Stephens during October 1950? A. That's right.

Q. In fact, you came on the Stephens about three or four days after it was delivered at Morgan City, isn't that right? A. That's right.

Q. And you came on board as an alternate Captain? A. That's right.

Q. Do you know Mr. McAllister here in court? A. Yes, sir.

Q. He was a member of the crew of the Stephens while you were Captain? A. Yes, sir.

Q. Are you still alternate Captain of the Stephens? A. Yes, sir, I am still Captain.

Q. And Mr. McAllister was the engineer on your crew? A. Yes, sir.

Q. Do you remember that Mr. McAllister fell, did you see him fall? A. I did not see him fall.

Q. He later told you that he had fallen? A. Yes, sir, he told me about it.

Q. And you told him, or did you tell him, to make an entry in the Log? A. Yes, sir, I did.

The Court: Speak out so we can hear you.

A. Yes, I told him to put it in the Log.

Q. Mr. Bolton: And he did do that? A. He did, sir.

Q. And while he was your engineer, he made most of the entries for you in those Logs, did he not? A. He did, sir.

Q. Now, do you have any recollection about that 615 day at all, as different from any other day? A. I would not remember that day being different from any other day.

Q. You have examined the Log and seen the entries in it on that day recently, have you not? A. Yes, sir, I have.

Q. And did that refresh your recollection about what the boat did on that day? A. Yes, sir, it did.

Q. And there is nothing in the Log Book there about the weather conditions that day, is there? A. No, the Log does not have anything about the weather conditions.

Q. And not anything on that day certainly? A. It does not have it.

Q. Now, do you remember the weather conditions that day? A. No, I do not.

Q. Now, you are the same Ferdinand Dressel whose deposition was taken in Morgan by Mr. Mandell here, along in last fall sometime, are you not? A. Yes, sir, I am.

Q. And the questions that he asked you in that deposition have been read to the jury. Now, in that deposition, you stated that you had seen water on the steps leading from the galley to the lounge on some occasion, is 616 that not right? A. That's right.

Q. And that is true, you have seen water on those steps? A. Yes, sir, I have seen water there.

Q. Putting all other water aside or any fresh water or any other kind of water that you might have gotten on there by washing the steps down,—that was done sometimes, was it not? A. Yes, it was done from time to time when necessary.

Q. You have seen them and required your crew to clean the boat to that extent that they would wash the deck down?

Mr. Mandell: I object to the leading questions.

The Court: Sustained.

Q. Mr. Bolton: Alright. Aside from water which might have been on the steps from any "fresh" water used there,

if any, was any particular type of weather condition—was there, which the boat must have been in any time that you saw water; sea water on the steps of the boat? A. I am sorry, but I didn't understand the question:

Q. Well, when you saw sea water on those steps, I believe you have testified by deposition that on occasion you have seen sea water on the steps of the boat, is that right? A. I have, sir, yes, sir.

617. Q. Now, then, whenever you observed that, what kind of weather had the boat been in before you saw that? A. When I saw water on the steps, it was when we were in the trough of the sea and the wind blowing on that side.

Q. Describe the trough and the sea that you mean. A. Well, I mean by going a side wind, we would be in the trough of the sea.

Q. Now, how high would be the waves? A. Well, the waves would commence to come over about four or five feet.

Q. Four or five foot waves with the wind coming on the side blowing towards the boat, is that right? A. That's right.

Q. And is it only when you have that kind of sea that you afterwards saw any water on the step or steps? A. That is right.

Q. Now, then, were there many occasions or few occasions when you have been out in the Gulf when there was no sea water of any kind got on the inside the protected part of the Stephens? A. I don't understand your question:

Q. The question I asked was whether—I will ask you this way. Did you get water in your galley or in your lounge inside the protected hull every time you went 618. out into the Gulf? A. Oh, no, sir, not every time.

Q. Did you get it only when you encountered seas such as you have described? A. That is right, sir.

Q. And wind from the direction such as you have described? A. That's right.

Q. From time to time after you became Captain on the Stephens, water did seep or leak, or did water seep in or leak in around these two forward windows on the port side, the windows over the galley? A. It did, sir.

Q. Would that water on occasion first collect in the drip pan or drip lip located between these two windows?

Mr. Mandell: We object to that as leading and suggestive.

Mr. Bolton: I believe as the witness stands, he is subject to cross examination. He was offered by the Plaintiff. I am trying to expedite matters.

The Court: Please refrain from leading.

(Recess)

Q. Mr. Bolton: Captain Dressel, do you know whether or not since you have been on the Stephens there has been water collected in the drip pan below the galley window on the port side? A. Yes, sir.

Q. Well, has there or has there not been? A. There has been.

Q. There has been water there? A. Yes, sir.

Q. Now, then, do you know where that water would go if it did not drain out through the side that was by the action of the boat thrown out inboard? A. It would go on the bottom part of the steps and the floor.

Q. The bottom part of the steps and the floor? A. Yes, sir.

Q. Now, then, Captain, actually when you are running that boat in heavy weather where is your station and what are you doing? A. My station is in the pilot house steering the boat.

Q. And that is where you are when the boat is in heavy weather, in the pilot house? A. That is where I am, yes, sir.

Q. You are responsible for the boat and that is where you figure your responsibility lies; is that right? A. (No answer.)

Q. Did you answer my question? A. I did not answer. I am pretty much all over the boat, but that is where I am required at that time.

620 Q. Alright. Now, then, I hand you Defendant's Exhibit No. 2, and ask you whether or not you know where this long metal tread comes from. A. It comes from the top step of the ladder of the motor vessel, J. C. Stephens.

Q. Do you know about when it was removed? A. It was removed in the latter part of last year.

Q. In November or December of 1954, is that right? A. That's just about right.

Q. Did you remove it? A. I did.

Q. And is this the step? A. That is the step.

Cross Examination

By Mr. Mandell:

Q. Mr. McAllister worked for you a number of years, didn't he? A. He did, about two years or better.

Q. And he made you a very good hand, did he? A. He certainly did, sir.

Q. He kept his engineroom clean? A. He most certainly did.

Q. And he was a trustworthy employee, wasn't he, 621 you relied on him? A. I most certainly did rely on Mack.

Q. When he told you something you knew it was the truth? A. That is right.

Q. And I believe you told the jury that you didn't—you don't remember what the weather was on that day when he told you that he slipped and fell on the wet step leading from the lounge to the gallery, you don't remember what the weather was? A. No, sir, I do not remember.

Q. If the weather had been so bad as to be very unusual, you would have remembered, wouldn't you? In other words, if something suddenly would have come up that you don't expect. A. Anything like that, it seems like I would have remembered it.

Q. If you had a sudden unexpected high seas or freak seas or something like that come up suddenly and without any expectation, you would remember that, wouldn't you? A. I would remember that.

Q. Certainly. But nothing like that comes to your mind, nothing like that so far as you know happened, that's true, isn't it? Nothing unusual happened that day, October the 19th, when Mack told you he was hurt? A. I don't remember of anything unusual.

622 Q. And if something unusual would have happened you would have had it put in the Log Book, wouldn't you? A. Well, for instance what?

Q. For instance, I notice here in the Log Book you have an entry there that the weather was—a fifty mile per hour wind and rough seas. That is something though not unexpected, it is not very usual is it? A. Fifty mile wind is not unusual, but it is something to remember.

Q. That's correct, and when something like that happened, you had it put in the Log Book because it is in the Log Book. A. (No answer.)

Q. And on March 13, 1951, you have an entry in the Log Book,—“standing by Block 72, rough seas, wind approximately fifty miles per hour. That, while not unexpected was unusual and you had it entered into the Log Book? A. That's right.

Q. So that if on October 19, 1950, there is no such entry in there, then in all probability while there might have been some rough seas, there wasn't anything of such that you deemed of importance—of such importance to have it put in the Log Book, that's true, isn't it? A. That's true.

623 Q. And if a freak sea or if sudden unexpected wind or hurricane would have come up, if it did, you would put it in the Log Book because it would be very unusual, wouldn't you? A. Yes, sir.

Q. And if it isn't in the Log Book, in all probability, nothing like that happened, that's true, isn't it? A. That's true.

Q. You did tell us that water that came through the port holes,—you know what I am talking about, when I say port holes? A. Yes, sir, you are talking about the two side windows.

Q. Yes, sir, and water did come through those two port holes from time to time? A. It did, sir.

Q. It would accumulate, some of it, would come in to such an extent that it would accumulate in this what Mr. Bolton calls a drip pan, around these two windows, is that correct? A. That's right.

Q. And of course when the vessel would be rolling and pitching, it would slosh out? A. That's right.

Q. And when it would slosh out, I believe you testified that it would fall either on the deck or on the lower steps, is that right? A. I said that it would fall on the bottom steps and on the floor.

Q. Now, then, if water did fall there, that bottom floor no the deck, and the steps were being used by you and by whoever had to use them? A. It was used by everyone on the boat including the passengers.

Q. And of course that water would be tracked up and down, depending on how much walking there was on that step? A. Depending on how much water one's shoes could absorb.

Q. Now, you also know, do you not, that on many occasions when you went out with the J. C. Stephens, the spray would hit all of these windows while you were in the wheelhouse so that you had to use the windshield wiper? A. That is right, sir.

Q. That was nothing unusual? A. Nothing unusual.

Q. And sometimes you had the water going through these windows and onto the deck or the wheelhouse? A. The water in the wheelhouse, did you say?

Q. Yes. A. Those windows were also provided with some drip pans and copper pipe.

Q. And water would accumulate there from time to time?

A. Yes, sir.

625 Q. And when the vessel would be rolling or pitching, why that would slosh out on the deck? A. If we had enough wind for that water to remain in those pans, yes, sir.

Q. Now, during 1954, I believe, you all had some strips of aluminum put on the overhead ceiling in the galley, do you remember that? A. I do remember about those strips that you speak of—it was in 1954, yes, sir.

Q. During 1950 there were no overhead strips on the ceiling there, the place where the aluminum would come together, you could see the seam there before they put those strips? A. That is correct, sir.

Q. And before those strips were put down upon the ceiling,—I am showing you Plaintiff's Exhibit No. 9.—these are the strips we are talking about, isn't it? A. That's right.

Q. Before then the ceiling was something like we have right above this place? A. That is right.

Q. Without any strip? A. Without the strip.

Q. Those strips were put in there, were they not, to prevent some leakage that might come through? A. There was some seepage there, yes, sir. Now, when I say

626 there, I mean the part that is over the pilot house.

Q. Yes, sir, and you also know, did you not, Captain, that after Mr. McAllister had to—did wear a belt around his back because of his back trouble? A. Yes, sir, I was aware of that.

Q. And you all were a small crew in a small boat and you tried to help each other as much as you could? A. That is the way on a small boat, yes, sir.

Q. And on many occasions you have seen Ashton stand by for Mack in the engineroom while he was resting, that is true, isn't it? A. That is true. We try to that because we want to make engineers out of the deckhands if possible.

Q. And in addition to flat, you knew at that time that Mack was having some back trouble? A. Mack was having back trouble.

Q. And that back trouble started after he reported to you that he slipped and fell off of those wet decks? A. Mack told me—

Mr. Bolton: I object to that because I believe he said wet decks.

Q. Mr. Mandell: I mean steps. A. When Mack first told me that this belt that he was wearing was bothering him, it was about two or three months after his slip, as I remember.

627. Q. After he told you about slipping from those wet steps? A. That is right.

Q. Now, at the time I reported to you that he slipped on these wet steps, did he tell you when that happened, what time or where the vessel was? Do you remember that? A. He did not tell me where the vessel was or what time it was. He told me he had fell down the steps and he would like for me to put it in the Log, and I told him to put it in the Log just as he saw it happen, and that I would sign it.

Q. Alright, and now, when he told you that he had slipped and fell on the steps leading from the lounge to the galley,—that's what he told you, didn't he? A. From the lounge to the galley, that is correct.

Q. And that those steps were wet, he told you that, didn't he? A. I don't remember that he told me they were wet.

Q. Well, let me see if this Log Book refreshes your memory. This is dated October 19th, 1950,—"R. A. McAllister slipped on wet ladder steps leading from lounge

to galley, twisted back and left shoulder; -- now, that's what he told you, didn't he? A. I do not remember that he told me that; but if he put it that way that is the way it is.

Q. And if he put it down that way you, knowing Mack as you do, you know that is what happened, because 628 you believe him to be a trustworthy man? A. I do believe Mack to be a trustworthy man.

Q. Do you remember when I took your deposition in the office of the Magnolia Petroleum Company in Morgan City, Louisiana? A. I do remember.

Q. And you swore to tell the truth just like you did right now before this Court and jury? A. I did.

Q. And to the best of your ability you did tell the truth, didn't you? A. I did.

Q. Now, one or two more questions and that is all. Captain, do you remember I asked you what method do you use walking down these steps and you said you didn't remember? A. That is right.

Q. Do you know now what method you use? A. So far as the methods, I go down the steps just as I am accustomed to them, and I don't pay particular attention to how I go down the steps.

Q. You do know, do you not, though, Captain, that as you step over the combing from that lounge onto the deck 629 on the other side of the combing, you know what I am talking about, don't you? A. I do.

Q. And before you step down onto the first step, you have to stoop over just a little bit to be able to reach the handrail, if you want to use the handrail? A. I believe that is right.

Q. Now, in that position, you cannot reach the grabiron because that is a little bit too far away. Do you know which grab iron I am talking about? A. No, I don't.

Q. Well, is there a grabiron right forward of you? A. Yes, it is overhead further forward as the side railing runs out.

Q. As the side railing runs out, then on top there, there is a grab-iron? A. Yes, sir.

Q. And from the top of the steps as you put your foot down on the first, you can't reach that grab-iron without maybe doing something like that. You don't know whether you can reach it then, that's true, isn't it? A. That is true. You are not supposed even to try to grab it.

Q. That's right. And until you walk down the second, third or fourth step, then you reach for that grab-iron?
A. Yes, sir.

Q. Do you use that grab-iron? A. I use the grab-
630 iron often.

Q. You do? A. Yes, sir.

Q. And if you were to walk down backwards facing the stairs, you couldn't use that grab-iron, could you? A. You couldn't very well use that grab-iron walking backwards.

Q. So these steps were so fixed and designed that when you walked down, you walked down looking forward, this way? A. That's right.

Q. Do you remember the location of the barge, the drilling barge, I believe it was, during October 1950, a little ways off of No. 7, Beacon? A. I don't remember the location, but usually when they are brought in, they are just around—they are usually a little to the east.

Q. A little to the east. That's what I thought. So then, let's assume for argument's sake that this barge here is No. 7, Beacon and this is west. The drilling barge would be somewhere to the east, would it not? A. That is likely that it would be to the east.

Q. And if you were proceeding from Beacon No. 7, east and there was a northeast wind, either twenty-five or thirty miles an hour or thirty to forty miles an hour with 631 the seas rough, which the Coast Guard says, five to eight feet waves, then the wind and the sea would be on the port side of that vessel? A. That's right.

Q. And right over the area these port holes or windows? A. That's right.

Q. And depending on how much water would strike it and the condition of the windows or port holes at that time, the water would come through, and depending on how much movement there was, it would fall on those steps and on that floor? A. That's right, sir.

Re Direct Examination

By Mr. Bolton:

Q. Off of Eugene Island Light down there, or off Beacon No. 7, which you just described, the probable place the

barges are located, is that a shoal area? Is the water deep or shallow? A: The water is very shallow.

Q: Now, then, if this wind was coming out of the north thirty to forty miles an hour, would that make the water deeper or shallower? A: Water from the north or 632 northeast, it would make the water shallower.

Q: The wind coming from the north or northeast would make the water shallower? A: Yes.

Q: That is coming from off of the land, is it not? A: That's right, sir.

Q: Now, then, if you have wind out of the north and northeast thirty to forty miles an hour, and you are in this area of shallow water, do you have five to eight foot seas? Is there that much water or would your boat be aground? A: I don't say that the boat would be aground, but I don't think you would have enough water to have five or six foot seas.

Q: That would be a very unusual condition, would it not? A: It would be.

Q: And if had instead of five to six foot seas, you had two to three foot wind waves coming from northeast to southwest and if you had a one foot to two foot ground swell coming from the southeast, do you think you would have enough water come over the side of the Stephens to get those windows—to play against the windows in water, first? A: Not in water, no.

Q: Not in water. Now, would you have a great deal of water in the form of mist or would there be not so 633 much water? A: You would not have so much water in the form of mist.

Q: And if your boat was proceeding as this drawing—this is the boat and those are the conditions, thirty to forty miles wind out of the northeast to the southeast, the boat proceeding this way, a two to three foot wind chop, a one to two foot swell, would the Stephens be taking in water over the bow or the side of the ship? A: I would not be taking water of any sort except possibly spray.

Q: Alright, that's all.

Direct Examination
By Mr. Bolton:

Q. State your name, sir. A. John Pullin.

Q. How do you spell your name? A. P-u-l-l-i-n.

Q. You live at Erywick, Louisiana? A. No, sir, at present, I live at Jennings, Louisiana.

Q. Jennings, Louisiana? A. Yes, sir.

Q. Are you employed by the Magnolia Petroleum Company? A. Yes, sir.

Q. And at this time, what are you doing for the Magnolia Petroleum Company? A. I am a mechanic on Barge 3.

Q. You are a mechanic on Barge 3; that's an offshore barge? A. Yes, sir.

Q. Now, have you ever served on board the motor vessel, Stephens? A. Yes, sir, I have.

635 Q. For Magnolia Petroleum Company? A. Yes, sir.

Q. And when did you do that, Mr. Pullin? A. Well, from the time we went and got her in Baltimore when she was new, until about two years afterwards.

Q. That took you down into sometime in late 1951 or early 1952? A. Late 1951, yes, sir.

Q. Did you go get her? A. Yes, sir.

Q. You were on the crew that went and brought her back from Baltimore, is that right? A. Yes, sir.

Q. Now, who did that crew consist of? A. There were four of us. There was George Rosson, Les Levy, myself and cook by the name of L. B. Malonson.

Q. Alright, now, then Mr. Pullin, what was your job, what was your classification on the Stevens? A. I was engineer.

Q. Do you know Mr. McAllister here? A. Yes, sir.

Q. Would you mind speaking a little louder? A. Yes, I know Mr. McAllister.

636 Q. He had the same job on the Stephens that you had; is that right? A. Yes, sir.

Q. Except that you worked on opposite crews? A. That's right.

Q. Now, you are familiar, are you not, with the vessel itself? A. Yes, sir.

Q. Having served on it for two years? A. Yes, sir, I am very familiar with it.

Q. Do you know the location of Eugene Island Light?

A. Yes, sir.

Q. Do you know the location of Beacon No. 7, Light?

A. Yes, I do.

Q. And were you during the time it was used as a quarter boat, familiar with the Magnolia Inn, the quarter boat?

A. Yes, I remember the Magnolia Inn.

Q. Do you know where the Magnolia Inn was moored or docked at Eugene Island Light? A: Yes, just north of the Light itself.

Q: And was there or not a dock or pier there to which it was moored? A. It was behind the dock, yes, it was docked up to a pier.

Q. Was there a gangway leading from the pier to the vessel? A: That's right, yes, there was.

Q. And did you ever, while on the Stephens, come 637 into Magnolia Inn? A. Yes, sir, quite often.

Q. Do you know where the ladder leading from the lounge to the galley is? A. Yes, sir.

Q. Have you been up and down that ladder many times?

A. Several times, yes, hundreds of times, I guess.

Q. You did that in connection with your work while living on the Stephens? A. Yes, sir.

Q. I hand you Defendant's Exhibit No. 2, and ask you to—first I call your attention to the long metal strip, and I will ask you if you can tell me what that is. A. Yes, sir, that is one of the treads off of one of the steps.

Q. Treads off of one of the steps on the Stephens? A. Yes, sir.

Q. On that ladder? A. Yes, sir, on that ladder.

Q. Now, you were on the Stephens for the first two years after it was delivered? A. Yes, sir.

Q. Now, during that time, did you observe yourself, water coming in or water collecting in a lip pan or drip pan located directly below the galley windows on 638 the port side? A. Yes, on those two windows.

Q. Describe what you saw there. How did that appear, how much water and so on? A. Well, it was enough to drip over onto the deck and the floor if we were in enough of a sea to force it against that window, it would come in that pan, and usually the pan would not drain as fast as it would come in.

Q. Was the pan fixed so that it would drain? A. Yes, as I remember there some holes drilled in it for it to drain somewhere.

Q. Do you know where it drained to? A. I wouldn't say definitely, no, I don't remember.

Q. Well, did it either drain outside or inot the bilge? A. I wouldn't—I can't say.

Q. You just don't know? A. No, I don't.

Q. Do you know how water got into that pan? A. Yes, it was from outside, if that is what you mean.

Q. That is the source of it. Now, how did it get from the outside of the boat inot the pan on the inside of the boat?

A. I don't know where the leak was. I mean, I don't know exactly where it was leaking. I couldn't tell you.

Q. Well, it such a leak as if you would pour water in, or how would you describe the leak, if you know? A.

639 Well, no, it wouldn't pour in. It was more or less of a, almost a seepage, I guess.

Q. Is that the best way you can describe it? A. Yes, I have never seen it quirting in under a sea. I guess the best way would be just a seepage or a leak there.

Q. Now, your duty, stationed on the Stephens while it was underway was in the engineroom or right in the lounge, or the galley right by it; is that right? A. We didn't stay in the engineroom, no, sir.

Q. You did not stay in the engineroom? Well, then, you were not in the engineroom, where did you stay? A. Well, around the wheelhouse, we would hold the wheel at times, while underway. We would check the engine every few minutes and then come back out. It was kind of warm in there.

Q. So that every time you did that, was it or not necessary for you to go up and down that ladder? A. Yes, that was the way into the galley and into the engine room.

Q. Now, during the time that you were on the Stephens, did you ever fall down that ladder? A. No, sir, I didn't.

Q. Did you ever see anybody fall down that ladder? A. I really can't say. I may have and I may not have.

Q. Well, do you remember? A. I don't remember seeing it.

640 Q. Now, then, when we talked about the windows earlier, you said the water came in from the outside? A. Yes, sir.

Q. And did it require there to be any particular kind of weather condition before that condition would occur? A. As best I remember, it took quite a bit of pressure, I guess we should say, from the sea or from the wind to get it up there and make it leak, the best I remember.

Q. Now, then, when the pressure came from the sea, what kind of waves would there be? A. You mean what size waves?

Q. What size? A. Well, that would have a lot to do with the wind, I guess it had to be a four foot or five foot sea with the wind off of that port bow.

Q. It would have to be a four or five foot sea with wind? A. I would imagine so.

Q. Is that your best recollection of it? A. Yes, I would say that.

Q. Now, then, was there a freeboard on the forward part of the Stephens? By freeboard, I mean an area between the main deck and above the water-line. A. Yes, sir, there was some freeboard there.

641. Q. How much freeboard? A. I would have to guess again. I would say five feet.

Q. Five feet? A. Maybe six.

Q. Five or six feet. Now, then, when the Stephens was in smooth water when this four or five foot wave condition did not exist; would it take water over the bow of the Stephens underway? A. No, sir, I don't think so.

Q. Now, when the Stephens got underway, would or not the level of the boat change slightly? A. Yes, sir, the stern would pull down.

Q. The stern would pull down. When the stern would pull down, what happened to the bow? A. It had to go up.

Q. Have you been on the Stephens in all kind of weather? A. Yes.

Q. What is the worse weather you remember being on, in terms of waves? A. That's the kind of a question that I am going to have a little trouble answering, because I have been out on several boats and we have had some rough weather on all of them. I guess I could say seven or eight foot safely.

Q. That is as bad a wind condition, a wave condition as you remember encountering on the Stephens? A. I would say so.

642 Q. How was the Stephens kept? Who maintained it and kept it clean? A. We had a deckhand that did most of the cleaning.

Q. Who cleaned the engineroom? A. We did, the engineers.

Q. You didn't have anybody helping you as engineer? A. No, sir, not on my wake.

Q. And when you had a more general clean-up than that, say at the dock, would you help? A. You mean around the whole boat itself?

Q. Yes, sir. A. Yes, we would all pitch in.

Q. Was that general clean-up conducted frequently or seldom on the Stephens? A. It was quite frequently. We would have a real good clean-up each week before we would get off. We would always give it one good cleaning for the other crew to come on, but it would get cleaned down two or three times during the week, too.

Q. And did that or not take place when you were standing by at one of the other places? A. Yes, sir, usually.

Q. Would you clean up or would the deckhand? Have you seen him clean up conditions as he discovered or 643 had developed when you were underway? A. Yes.

Q. Did he have all kinds of cleaning material, mops and that kind of thing or not? A. Yes, he had a mop and a broom and a dust pan, things like that.

Q. Those were always available on the boat itself? A. Yes, sir.

Q. I will ask you about the third window aft on the port side, not counting the wheelhouse window, this one here. What space—what space was that over, if you know? A. There was a little landing before you go down in the galley, just a little, I imagine, two foot square landing there.

Q. And this window over, was above that landing, is that correct? A. Yes, sir.

Q. Now, have you ever seen that window opened while you were using the Stephens? A. No, sir, I never have.

Q. Is there any way to fasten that window open, if you know? A. I don't think there is. I have never seen it open and I have never tried to open it, so I don't remember, but I don't think there was any kind of a latch to hold it open.

Q. Now, then, if this window were to be opened, what would have to be done in order to permit the window

644 to move on its hinge? A. I have never tried to open it.

Q. Well, is it dogged down? A. Yes, I think there were bolts on it, but I don't remember that.

Q. I hand you a photograph marked Defendant's Exhibit 6, and ask you to look at it and see if that is or not a picture of that window. A. Yes, it looks just like it. It has bolts and nuts. There were no wing nuts, that is what I referred to when I said it had no bolts on it.

Q. I didn't hear you, sir. A. I said I didn't remember seeing wings on it. I was almost certain it had bolts on it, but I had never moved it, so I wouldn't say.

Q. Mr. Bolton: Now, then, what was necessary to open that window, if that is a window? A. You would have to loosen those nuts and swing it up.

Q. Would it take a wrench? A. Yes, it would.

Q. If it had been opened and swung up, would it interfere with passage? A. Yes, it would be in the way.

Q. You have yourself been up and down this step many times—it is a step off of the Stephens, is it not? A. 645 Yes, sir.

Q. And can you tell the jury how you went about stepping from the landing, this two-foot square deck that you have described, onto the first step of the ladder, the top step of the ladder? A. I don't quite understand the question. How would I go about stepping on it?

Q. Well, which way would you turn, if you know, what would you do with your hands? A. Well, there was a rail on the lefthand side, and there was also a rail forward just as you step down, there was an angle iron with a loop on it, you could grab with your left hand, and I used to always turn my foot sideways going down on a boat.

Q. Now, you have described—this is Plaintiff's Exhibit No. 9, and I will ask you if this is the rail that you spoke of, and this is the grab rail? A. Yes.

Q. Now, this grab rail is considerably forward of the top step, is it not? A. Yes, it was within reaching distance.

Q. You say it was within reaching distance? A. Yes, for me.

Q. Alright. A. Maybe a shorter man would have trouble. I could get hold of it.

Q. Alright, now, then, I believe you said you would turn your foot sideways slightly, is that correct? A. Yes, sir.

Q. And what was the purpose of that? A. Well, to get more bearing on that step.

Q. To get more foot on the step? A. Yes, sir.

Q. The step is not side enough to take your entire shoe? A. That's right.

Q. Now, then, would you turn slightly to the left or would you turn slightly to the right? A. I think it was more often to the left.

Q. And why would that be? A. Because I had the handrail on the left.

Q. And by turning slightly to the left and turning your foot slightly, you were in a position to easily reach the handrail, is that right? A. Yes, sir.

Q. And you would be able to put also—be able to put your entire foot on the tread of the step, is that right? A. That's right.

Q. You have testified that while underway, you would often leave the after-decking and engine, you would go up in the wheelhouse, relieve the Captain or remain in 647 the wheelhouse, is that right? A. Yes, sir.

Q. Do you know what the next promotion from engineer is on the Stephens? A. We would have to go in the office, I guess. That is about as high as you can go.

Q. Can you become Captain? A. Not hardly from engineer. You could, I guess, but most of us try to stay with the engine.

Q. Did you yourself ever handle the wheel on the Stephens? A. Yes, sir.

Q. The tiller wheel? A. Yes, sir.

Q. Have you been on the Stephens when you were in weather of such severity as to cause water to break on the bow and throw large quantities of spray or water back on the wheelhouse windows? A. I have, yes.

Q. And have you seen water leak in or seep in, get in around those windows? A. In that wheelhouse?

Q. Yes, sir. A. Yes, I have.

Q. And have you seen water in that type weather get in around the hatches or doors on either side or one 648 or the other side of the wheelhouse? A. Yes, I have.

Q. Is there any way provided in the boat to drain water from that wheelhouse deck? A. Yes, there was a drain almost under the radio, as I remember. There was one about midways the width of the boat, not amidship but back near the radio in the back of the wheelhouse.

Q. And you have seen water draining through that drain, have you? A. Yes, sir.

Q. Now, then, does not the wheelhouse deck, the deck of the wheelhouse, overhang the ladder leading from the crew's lounge to the galley? A. I think it does, but I am not going to say for sure.

Q. I hand you Plaintiff's Exhibit No. 12, and ask you if that is a picture of the wheelhouse of the Stephens. A. Yes, sir.

Q. And I have also here Plaintiff's Exhibit No. 9. I direct your attention to the seat; is that on the port side? A. Yes, sir.

Q. Then, I direct you to a picture taken from the galley aft looking up the ladder space, and I will ask you whether or not that refreshes your recollection about whether or not there is any deck from the wheelhouse overhanging this ladder? A. No, sir, there wouldn't be any deck. There would be the seat box over it.

Q. The seat top box, is that right? A. Yes.

Q. There is no bottom to that? A. No, sir.

Q. That built-in box? A. No, sir.

Q. And on this picture here then, this would be the deck of the wheelhouse? A. Yes.

Q. And there is no bottom to that built-in box? A. No.

Q. And on this picture here then, this would be the deck of the wheelhouse? A. Yes.

Q. And there is no deck over that, is there? A. That's right.

Q. Now, is there any deck over the companionway or passageway aft of that point? A. That's right.

Q. This bulkhead is as far aft as the wheelhouse deck extends? A. Yes.

Q. Do you know of any way that water, which might have been in weather such as you have described, could have gotten through these windows and gotten on the wheelhouse floor and from the wheelhouse floor dripped down or otherwise got on the top step of the

ladder leading down to the galley? A. No, sir, I don't think so. I can't think of any way.

Q. I neglected to ask you about whether you had ever seen any water inside the third window aft on the port side, the one that is over the landing. A. No, sir, I have never seen any water there that I ever remember of.

Q. But I believe you testified that you have seen water in the drip pan or drip lip under the two forward windows? A. Yes, I have.

Q. Do you know and have you observed where water which had collected in the drip pan and might have been thrown or splashed from the drip pan inboard; where would that water fall, do you know? A. As best I can remember, I should say it would fall on the lowerhalf of the stairs.

Q. The lower half of the stairs. Would some of it get onto the galley deck? A. Yes, sir, it would run down to the galley deck.

Q. Now, was there a scupper or drain in the galley deck near the ladder, near the door of that engine room? A. Yes, sir, there was.

Q. Right at the foot of the ladder, between the foot of the ladder and the engineroom, is there a drain or not? A. Yes, sir, there was one there.

Q. Now, if the Stephens were proceeding from Eugene Island Light, having just left, having been right alongside the Magnolia Inn overnight, and was proceeding at say .0400 to Barge No. 6, which was located at Beacon 7, do you know the course that you would have been on? A. Not exactly the compass course, I know just about, — south, as best I remember. I didn't keep much course.

Q. Would it be —

Mr. Mandell: Just a minute, I didn't hear him.

A. I am not much on the compass. The Skipper would always set the course, but between those lights which we run by dead reckoning, you could see the lights. You didn't have to follow the compass.

Q. Mr. Bolton: I will hand you this chart, and ask you if you have ever seen this chart such as used on the Stephens? A. Yes.

Q. Is that the Eugene Island Light? A. Yes, sir.

Q. You have seen this chart or one like it, have 652 you not? A. Yes, sir, I have.

Q. Now, then, if you proceeded from Eugene Island Light to Beacon 7, what would the course be? Which way would the boat travel? A. Well, right along this line.

Q. Inside the channel? A. Yes.

Q. And if that is the channel, that would be the course? A. Yes.

Q. Now, if this is due north and this is due south and this is west, what would you be going, about? A. It would be southwesterly.

Q. You would be going in a southwesterly direction? A. Yes.

Q. And would it be roughly the same direction, if this is the Stephens as it appears here, assuming that this is north as shown on this little compass up here? A. Yes.

Q. Do you know whether the water in that area is deep or shallow? A. It is shallow water.

Q. Was it almost a shoal area? A. Yes, it was a shoal area.

Q. It was a shoal area? A. Yes.

653 Q. And about how deep was the water in the channel? A. Ten to twelve feet, I would say.

Q. Ten to twelve feet, the water in the channel, and was the channel the deepest water in that immediate area? A. Yes, sir; we had to stay right in the channel.

Q. You had to stay right in the channel? A. Yes.

Q. And the water on either side of the channel was less than ten or twelve feet deep? A. Yes.

Q. Is that right? A. Yes.

Q. Now, then, if you left Magnolia Inn and headed directly to Eugene Island Light, you would be traveling roughly in this direction, wouldn't you? A. You mean out?

Q. I mean if you left Eugene Island Light and proceeded to Beacon 7? A. Yes, sir.

Q. You would travel in this direction? A. That's right.

Q. Now, how long a run was that to the light? A. Half an hour's run to the light.

Q. Half an hour's run to the light. Now, and at what speed would you usually keep your engine, or would the Captain direct you to keep your engine on that run? A. Between 800 and 1000 revolutions.

Q. Is that approximately full? A. Well, full is 1275, I believe it was on that engine.

Q. That is in terms of revolutions on the shaft? A. That was revolution on the motor.

Q. Oh, on the motor. A. We had a reduction gear.

Q. Reduction gear? A. Yes, sir.

Q. I see. Now, if you were proceeding on that course between these two points, and if you had a wind out of the northeast blowing in the same direction that you were going, from thirty to forty miles per hour wind, and if the conditions of the sea was that you had a two to three foot chop which is roughly shown on this drawing as these lines here, in the same direction and driven by the wind, and if you had a one to two foot swell, ground swell, as shown by these wider interval lines, coming from the southeast, do you know or have an opinion as to whether or not under those conditions, the Stephens would be taking water over the bow, or on the main deck, weather deck?

A. Well, I would rather say that I think—

Q. Well, do you have an opinion? A. Yes, my 655 opinion would be that it woouldn't come over the bow.

Q. It would not come over the bow? A. That's right.

Q. That's all.

Cross Examination

By Mr. Mandell:

Q. Mr. Pullin, did you come down with that vessel from Baltimore? A. Yes, I did.

Q. When did you first discover about these port holes on the port side of the vessel over and above the stairs leading to and from the lounge were not water-tight? A. Well, I don't remember that.

Q. It was shortly after you got on there, wasn't it? A. Shortly after we got into the Gulf with it. We never had any trouble with it from Baltimore down, I am sure.

Q. But after you got into the Gulf, you noticed that these port holes were not water-tight, is that correct? A. Yes, sir.

Q. And you all tried to put the gaskets back in place and caulk it to try to make it water-tight, didn't you? A. No, sir, I never did.

656 Q. You didn't? A. No, sir, I didn't.

Q. Do you know what employees of the Magnolia Petroleum Company tried to do that? A. No, sir, I don't. It didn't leak that bad.

Q. Well, it did leak bad enough so that water would accumulate in that drip pan or drip lip that you are talking about over the port holes, there was water there that accumulated? A. Yes, sir, after several hours, after some time, I'll say.

Q. Sir? A. After some time, I wouldn't say how long.

Q. Depending on how much water came in over the side? A. That is right, yes, sir.

Q. And you know there are two ways for sea water to hit those sides, one is from the wave itself and from the rolling of the vessel and one is, as the wind carries the spray? A. Yes, sir.

Q. And even if you were going forward and there is a spray naturally made by the flare of the vessel, if the wind blows in the right direction, it will pick up that spray and hit either the port or starboard side of the vessel? A. Yes, if there was a spray, the wind would push it up there.

657 Q. And under those conditions, you would get water coming through these port holes and as the vessel was pitching and rolling, depending on its severity, it would slosh out onto the steps and onto the lower deck of the galley? A. I am almost certain that is the way it got out. I have never noticed it that I remember. It is hard to say on that answer.

Q. I believe you said you served as an engineer on the Stephens for about two years? A. Yes, sir.

Q. Then you were transferred to another boat? A. Yes, sir.

Q. Were you transferred to a tug also? A. Yes, sir, from the Stephens I went to the Little, which is a tug.

Q. Do you remember about Mr. McAllister being hurt on the boat? A. Yes, sir, I remember hearing of it.

Q. Do you remember that after that, he too was transferred on the Little? A. Yes, sir, he did go on the Little before I did, that's right.

Q. When you came on, you found him there, didn't you?

A. When I went on the Little?

658 Q. Yes. A. You mean—

Q. Yes. A. I don't remember.

Q. Anyway, the job on the Little as an engineer paid more money than on the Stephens? A. Yes, sir, it did.

Q. About seventy-five dollars a month more, didn't it? A. It seems that is about what it was.

Q. And yet Mr. McAllister asked to be relieved from those duties and get back on the Stephens, if you know? A. I don't remember.

Q. But you know that he left the Little and got on the Stephens? A. No, I don't remember that. I had never thought of it and I just don't remember right offhand.

Q. You do know he was on the Little? A. Yes, sir.

Mr. Bolton: Will you speak up a little louder so we can hear you, please?

A. Yes, sir, I was on the Little.

Q. No—that he was on the Little. A. That's right.

Q. You do know that Mr. McAllister was on the Little? A. Yes.

Q. And you do know that later on he was back on
659 the Stephens? A. I think he was.

Q. Yes, sir. A. I can't say definitely.

Q. Now, do you know whether you reported the condition, this leaking and not water-tight port holes to the management of the Magnolia Petroleum Company? A. I don't remember of reporting it myself, no, sir.

Q. Whose duty was it to report it? A. I suppose the Captain's, sir.

Q. Did you attend the safety meetings that Mr. Rhodes would have from time to time? A. Yes.

Q. Did he tell you at that time, that as an engineer, if you found anything wrong about the ship to let him know?

A. I am sure he did, but I don't remember the words.

Q. Well, why didn't you report the condition of these port holes to him? A. Well, I guess because I never saw a window that didn't leak.

Q. When they didn't leak? A. A window that didn't leak in the Gulf under certain conditions.

Q. I didn't hear you. A. I guess I didn't report that particular window, because I have never seen a window that didn't take some water.

660 Q. Oh, I see. A. In the Gulf under those rough conditions.

Q. You say the Magnolia Inn Boat was docked just north of the Eugene Island? A. Yes, sir.

Q. And whenever you got to these drilling barges, did you ever visit those drilling barges? A. Yes, sir, we would go aboard.

Q. You saw those drilling barges had people that work on them covered with mud and oil and stuff like that? A. No, sir, not covered with mud and oil, I can't say that.

Q. Oh, I am sorry. They have dirt and oil and things like that on their clothes and on their shoes? A. At times, yes, sir, I would say.

Q. And you saw them visit these boats while they were that way? A. No, sir, I haven't seen them come aboard the boat like that.

Q. Do they ever come down and go into the galley for a cup of coffee? A. No, sir, they always have better coffee on the barges.

Q. Oh, I see. A. I don't remember of seeing anyone doing that.

Q. Then some of these men off of the crew boats would go down and have some coffee on them? A. That's right, that's usually the case.

Q. You did see them, did you not, those men on these drilling barges during their lunch hour or supper hour, go in their work clothes into the galley to eat? A. Of the Stephens?

Q. No, on their own drilling boat. A. I didn't see it when I was on the boat. Now, since I am on a barge, I have seen that, but that's a rare occasion. If they are really dirty, they usually clean up.

Q. The men who work on these drilling barges when they knock off for lunch, do they take their clothes off? A. No, sir, not usually.

Q. Do they take their shoes off? A. No, sir.

Q. They wash their hands and clean themselves the best they can? A. That's right.

Q. And they go into the galley to eat? A. Yes.

Q. With the same clothes and the same shoes; is that right? A. Yes, sir.

Q. That happens at breakfast, lunch and supper? A. Well, for breakfast, we eat before we go to work.

Q. Alright. A. It is just noon and supper that 662 it happens, and inbetween coffee breaks.

Q. Inbetween, coffee breaks? A. Yes, sir.

Q. Is that right? A. Well, just the deckhands on the barge, the drilling crew usually has their coffee on the rig.

Q. I believe you said that while the boat was underway you would check the engine every few minutes? A. Yes, sir.

Q. That was your responsibility and your duty? A. That's right.

Q. And the only way that you had, was to go down those stairs leading from the lounge to the galley and then turn to your right and a couple of more steps into the engine room? A. That was the only practical way. You could get through a hatch on the forward deck, but we never used that.

Q. That would be the hard way, wouldn't it? A. That would be the hard way.

Q. Do you say that—and I copied it as you said it, that usually the water would come in from these port holes into these lips—do you know what I am talking about? A. Yes.

Q. Lip, I believe Mr. Bolton called it, and you say there's a hole drilled in there? A. I think one of the Captains drilled a hole to drain the water out.

Q. That was sometime in the latter part of 1951, wasn't it? A. I couldn't put a date on it.

Q. Well, it sometime after the boat was put in commission? A. Yes, sir.

Q. Now, before that hole was put in there, there was no place to drain except to slosh out, that's true, isn't it? A. I'm not sure.

Q. Well, where would it drain if there was no hole? A. I don't know. I didn't design the boat, however, they should have had some way there, but I couldn't give a definite answer on that.

Q. Well, you did give a definite answer, however, that the Captain drilled a hole in there for the purpose of drainage? A. Yes.

Q. Before the Captain did that, there was no way to drain that except slosh out, that's true, isn't it? A. I don't know.

Q. Well, where would it drain? A. I couldn't tell you. I would have to go back and look at the boat, I guess.

Q. Well so far as you know, there was nothing else before that hole was drilled? A. I don't remember.
664 exactly how that pan was made.

Q. I see. A. I have been off of there for four years.

Q. Now, regardless of how that was made, you yourself saw that water slosh out of there? A. I don't remember. I have seen water out of it. I have seen water on the deck and the lower steps, but I don't recall exactly how it got out.

Q. You also saw water dripping through the overhead ceiling in the galley? A. I think I have seen it over the galley sink, but that's too far back for that,—to remember it.

Q. Allright, and you saw water leak through the port holes or windows in the upper wheelhouse? A. Yes, I have seen it in the wheelhouse.

Q. Now, you say you can't think—I believe in answer to Mr. Bolton's questions, that you couldn't think how that water could get on the top step. You saw water on the deck of the galley and on the lower steps, every time you or anyone else would walk up and down those steps, you would track it up and down them, wouldn't you, or couldn't you? A. Most likely, yes.

Q. Now, then, that is one of the ways to get water 665 up there? A. Yes, sir.

Q. Sir? A. Yes, sir.

Q. If water was also leaking through, and if this large window on the port side was not water-tight, then water coming through there would fall smack on the upper part of these steps, woaldn't it? A. If that window leaked, yes, sir.

Q. You are telling here that you don't remember seeing the water leaking from there? A. I can say I have never seen it leak from there.

Q. But if it did, it might follow this first step, is that right? A. Yes, sir.

Q. Now, you have known Mr. McAllister for some time, haven't you? A. Yes, sir.

Q. And you worked as alternate engineers? A. That's right.

Q. And when he turned the engine over to you, you found it in ship shape; didn't you? A. Yes, sir, I did.

Q. He was a fine engineer? A. I think so.

Q. And he did his job fine so far as you know?
666 A. Yes.

Q. And kept his engineroom clean? A. Yes, sir.

Q. And he was regarded as a trustworthy and truthful and fine employee, wasn't he? A. By myself, he was, yes, sir. I can't speak for the other men.

Q. I understand that you are not what you might call a navigator, are you? A. No, sir.

Q. And you don't try to hold yourself as an expert on what the seas would do and how they would break over a bow? A. That is right.

Q. But from your limited experience, you do know, do you not, that a wind twenty-five to thirty miles an hour would carry the spray some distance, wouldn't it? A. Yes, if there was something to cause the spray.

Q. If you had the wind twenty-five to thirty miles an hour or thirty to forty miles an hour in a rough sea, then there would be both waves and wind to carry the waves and the spray? A. Yes, sir.

Q. And if the vessel was going into—was going in
667 an easterly direction, that would be here, and the wind was coming—was from the northeast, and you had either twenty-five to thirty miles an hour or thirty to forty miles an hour—and the sea was rough—that you had all the necessary conditions in order to raise sea and spray in here to go right over the port holes on the port side? A. You said headed in a westerly direction?

Q. No, sir. A. Easterly?

Q. No, sir, heading in this manner. A. Yes.

Q. You would just head it this way? A. Uh-huh.

Q. And these are the exact conditions under which you would expect the water to come to these unwater-tight port holes? That is true, isn't it? A. Yes, sir.

Q. As a matter of fact, Mr. Pullin, the scuppers drain this part? A. The drain on the deck?

Q. Yes. A. Yes.

Q. They were put in some time after the vessel
668 was brought in; wasn't it? A. No, sir.

Q. Do you think they were there when first took delivery of the vessel? A. Yes.

Q. Do you remember that the drain or scupper below the two front windows to the wheelhouse were put in a way

after the vessel was delivered, or do you know that? A. They were put in the shipyard just before we left.

Q. From Baltimore, you mean? A. Yes, sir.

Q. Alright. Now, do you know the difference between Eugen Island—from Eugene Island to the dredge that was just a little bitty piece of the No. 7. Beacon? A. The Shelf Dredge.

Q. There was a Magnolia—

Mr. Bolton: You asked about the dredge, they had a barge.

Q. Mr. Mandell: I am sorry. I mean the barge. A. No, sir, I don't know what distance it was. It was in because of bad weather, and they have no definite place to anchor.

Q. You also stated that this larger window over the stairs, the port hole, was never opened. As a matter of fact, neither one of these three port holes were open but very very seldom? A. You are speaking of the 669. port side now?

Q. Yes, port side. A. They were open quite often when—several times we took cooks out to do a job and the men had to eat aboard the boat and I am almost certain they were open at that time, because it was usually summer time.

Q. Do you have any independent recollection that they were open? A. I have opened the starboard side.

Q. Talking about the port? A. And I am almost certain I have seen the port holes open.

Q. Are you sure of that? A. I won't swear to it, no, sir.

Q. Not very often? A. No, sir, not very often.

Q. Now, you also remember, do you not, that the dogs over the port holes on the port side, over these very steps we are talking about, when the boat was first delivered were made out of aluminum? A. As best I can remember, they were aluminum.

Q. And do you remember that they deteriorated and corroded and they had to be changed? A. No, sir, we broke them off.

Q. Broke them off? A. Yes.

670 Q. How come they broke off, do you know? A. Tightening the windows.

Q. Sir? A. Tightening the windows.

Q. Tightening the windows? A. Yes.

Q. What were you trying to do, trying to tighten the windows so that water wouldn't come in? A. I am sure that is what it was, yes, sir.

Q. You weren't successful, were you? A. Well, after they broke, we had to have them replaced.

Q. There were a number of other knobs made of aluminum on the boat that gave away and became corroded and were changed, do you know about that? A. No, sir, I don't.

Q. That's all.

Re Direct Examination

By Mr. Bolton:

Q. I have a very short redirect, Your Honor.

The Court: Alright, proceed.

Q. Mr. Bolton: Would you immediately replace any bolts that broke off as you have described, I mean as soon as you got back in or right after that? A. Yes, 671 sir.

Q. So there wasn't any long period of time at which, or was there any long period of time at which there were no bolts on those windows that you know of? A. No, sir, I am sure there was no long time.

Q. Now, Pullin, Mr. Mandell talked to you about what wind would do to spray. I would ask you if the wind blowing as this wind was given to you—to blow, out of the northeast at thirty to forty miles an hour and your boat is proceeding at eight miles per hour, what would happen to any spray that was raised by the bow? A. I think it would fall forward.

Q. The wind is blowing faster than the boat is moving, is it not? A. Yes, sir.

Q. And considerably faster in that illustration, about thirty miles per hour? A. Yes, sir.

Q. Now, then, this drilling barge you were asked about, or a drilling barge, are there hands there regularly employed to keep that clean? A. Yes, sir.

Q. How many hands whose duty would consist solely of keeping the barge clean? A. There are four. There are three hands and the Captain who works with them 672 on the barge.

Q. And do they all work at keeping the barge clean?
A. Clean and painted, yes, sir.

Q. And there two shifts of those? A. No, sir, that is just a daylight shift.

Q. A daylight shift? A. Yes, sir.

Q. And in addition, do you have people to cook for you on the barge? A. Well, they change crews for that. They cook at night too.

Q. Do you have cooks in addition to your cleaning personnel on the barge? A. Yes, sir.

Q. When any personnel, either the barge personnel or the drilling crew personnel on the barge, boards a crew boat such as the Stephens to go to Morgan City, are they in work clothes? A. No, sir, they are not.

Q. What kind of clothes do they have on then? A. They are usually dressed to go home and catch buses and trains.

Q. Alright, sir. And now, when you take personnel out to the barges, on the Stephens, to relieve a crew that is already there, how are they dressed? A. They are 673 dressed the same way. As they came off of their means of transportation, they just catch the boat to go on out.

Q. Is there a storage place on the barge for work clothes? A. On the barge, yes, sir.

Q. And is that where work clothes and shoes are kept? A. Yes, sir.

Q. Now, I believe you told Mr. Mandell in answer to questions about where water, if water came in around this window over the passageway, the third window back. If water came in around that window, I believe you said it would fall smack dab on the steps. I will ask you whether—if it would fall slap dab or whether it take some other course in reaching the deck. A. Well, I guess it would run down the wall first.

Q. Well, do you think it would run down the wall first? A. Yes, sir, the window is not over the deck.

Q. And there is no wind in that area, is there, ordinarily? There is no big draft there, or is there? A. With the engine running, sometimes there was quite a draft going down.

Q. Down the ladder? A. At the compartment.

Q. The direction of the movement of the wind, in that draft would be which way? A. Forward. If we

674 had the engine room open into the galley, those engines consume quite a bit of air and they pull a draft down, yes.

Q. Well, when you ran the engines, did you leave the engineroom door cracked—door cracked? A. Yes, sir, a small crack.

Q. And was that for the purpose of providing that draft?

A. Well, it seems they ran better that way, they got more air.

Q. You got better performance out of your engine when you cracked that door, is that right? A. Yes, sir.

Re Cross Examination

By Mr. Mandell:

Q. This vessel, the Stephens, was actually proceeding east as we discussed it, or if the wind was in the northeast, as I believe you told us, it would be hitting on the port side of the vessel? looking at my pencil, this is supposed to be the boat? A. Alright.

Q. Now, then, if you turned back to go toward Morgan City, and the wind was northeast, it would be hitting 675 this way, wouldn't it? A. On the stern, yes.

Q. And there was a thirty of forty mile— A. On the stern—

Q. Excuse me. A. On the stern or bow.

Q. Bow, going forward? A. If you are going to Morgan City?

Q. Yes. A. With that kind of wind, it would be on the—

Q. Would it? A. Yes, you are right; it would be on the bow, directly on the bow.

Q. It would be on the bow? A. Yes.

Q. This is the bow right here, the wind would be coming this way, would it not? A. Yes, sir.

Q. Now, I would be going toward northeast. My boat would be going toward northeast? A. Yes.

Q. The wind would be coming from northeast and therefore carrying the spray southwest, wouldn't it, in the opposite direction? A. Yes, sir.

Q. And if my boat would go forward, the wind 676 would pick up the spray, and it would bring the

spray right over that boat, wouldn't it? A. Yes, I guess it would bring some over.

Q. That's all.

677 GEORGE ROSSON, a witness produced by the Defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Bolton:

Q. Your name is George Rosson? A. That's correct.

Q. R-o-s-s-o-n? A. That's correct.

Q. Mr. Rosson, where are you employed? A. In Morgan City, Louisiana for Magnolia Petroleum Company.

Q. Where do you live? A. In Berwick.

Q. And that's just across the Atchafalaya River from Morgan City? A. That's right.

Q. And how long have you lived in that area, Mr. Rosson? A. I have lived there all my life, with the exception of three years I was in the Service.

Q. Alright, now, how old are you? A. Thirty-two.

Q. And when were you first employed by Magnolia Petroleum Company? A. November of 1947.

Q. Before that time, what had your employment been? A. I was a boat operator before that also.

Q. Now, what kind of boats did you operate then? A. At the time, I was a troll boat, a troll type, it's a sixty-five foot shrimp boat, working for the Humble Oil Company.

Q. And you were a boat operator for Humble Oil Company? A. For Morgan City Boat Company. The boat was working for the Humble.

Q. I see, and how long had you held that position? A. I stayed on that job seven months.

Q. And then what before that, what did you do, Mr. Rosson? A. Well, prior to that, I was a painter, a bridge painter. I worked for the Chicago Bridge & Iron Company, painting the bridge across the Atchafalaya River.

Q. And what other employment have you had after you came back from the Service, that you haven't told us about? A. Well, I did a little trapping for musk-rats, but prior to my time in the Service, I had some time on boats, tow boats.

Q. How much time about, would you say? A. Well, I worked on shrimp boats, troll boats for just about three years, with my father, most of the time, and I put in six months on a tug boat working for Red River Barge 679 Line as deckhand running from New Orleans to Beaumont and Orange, Texas.

Q. Alright, now, what branch of the Service were you in? A. Army.

Q. Sir? A. In the Army.

Q. In the Army, and you didn't have any boating while you were in the Army? A. No.

Q. Now, when you went to work in November 1947 for Magnolia, were you in their Marine Division? A. That's right. I was hired as boat Skipper.

Q. As a boat Skipper? A. Captain.

Q. And what type of boat were you Captain of then? A. The first boat I went on for Magnolia was the E. D. Faulkner, a sixty-five foot crew boat, and my stay on there was pretty short. I worked on the Faulkner, I think, for a week and a half, and I was called into town and sent to Baltimore, Maryland to bring a boat back to Morgan City which Magnolia had purchased from the Government, I think, or the Maritime Commission.

Q. And what boat was that? A. That was the L. S. Sinclair, a sixty-three foot Coast Guard Cutter.

Q. Now, what is the L. S. Sinclair used for? A. At the time, it was used for a supply boat.

Q. At this time it is? A. Yes.

Q. What was it used for then? A. The same.

Q. How long did you stay on the Sinclair? A. Two years, approximately.

Q. And from the Sinclair, where did you go? A. I put in, I think, about between two and three months on different boats as mate, as relief skipper.

Q. And those were Magnolia boats? A. That's correct.

Q. When you first have connections with the Stephens? A. When we went to Baltimore and brought the Stephens back to Morgan City, we arrived in Morgan City in early December 1949.

Q. Then you took delivery on the Stephens from the shipyard which built it? A. Yes, sir.

Q. Do you remember the name of the shipyard? A. Wills-Stedden Shipyard.

Q. At Baltimore, Maryland? A. Yes.

Q. How did you bring the Stephens back, or what
681 waterway or passage, did you take? A. Well, we
came in down the Chesapeake Bay from Baltimore
to Norfolk, and then we took an outside run from Norfolk
to Stuart, Florida, I think it was, and came across Florida
from Stuart to Lake Okeechobee and into the Gulf at Fort
Myers, from Fort Myers, we came across a portion of the
Gulf into Panama City. You see I made this trip twice,
and that was either Panama City or to Port St. Joe, and
then from there, we came inland through New Orleans to
the Industrial Canal to Morgan City.

Q. Now, during that voyage, as you have described, were
you Master of the vessel? A. That's correct.

Q. And how large a crew did you have? A. There were
four of us on this trip.

Q. And was Mr. Pullin on your crew at that time? A. That is right.

Q. And who else was on your crew that you remember?
A. We had Lee Malonson, who was acting as cook, and
Leslie Levy was port engineer at the time.

Q. Allright, during that time, did you pay particular
attention to the boat and the way it performed? A. Yes,
sir, being a new boat and having charge of it, I sure did.

Q. At that time, did you notice or did you get any
682 water in the ship, in the boat? A. Well, naturally
there were a few leaks in any rough weather that we
encountered, but to amount to anything, not anything to
worry about, the boat being practically new.

Q. Now, what kind of weather did you encounter, if you
remember? A. I think we had fairly good weather this
whole trip.

Q. Well-- A. The trip with the Stephens.

Q. When you were in the Gulf, how far were you run-
ning from shore? A. I think at one point, we were one
hundred miles or better offshore.

Q. You were out as far as one hundred miles at one
point? A. Yes.

Q. Do you remember the depth of the water at that
time, or approximate depth of it? A. No, I couldn't recall
it. I could look at a chart and show you my approximate
course:

Q. Well, was that water deeper or shallower than the water— A. It was much deeper than where we operated.

Q. Were you off the Continental Shelf at that point? A. Yes, sir.

Q. You were in pretty deep water, in other words? 683 A. Yes.

Q. Now, you and Captain Ferdinand Dressel alternate as Captain of the Stephens; is that right? A. Yes, that is correct.

Q. In addition to that, is there a designation of Master on the certificate of the Stephens? A. Yes, I am signed on as Master.

Q. And there is only one Master, but there are two Masters on the Stephens? A. That is right.

Q. And you are the Master? A. Yes, sir.

Q. And have you been continuously employed on the vessel ever since you took delivery at Baltimore? A. Yes, sir, with the exception of my time off.

Q. Except for your times off, of course. But your employment has been continuous with Magnolia, and on that vessel? A. Yes, sir.

Q. Do you know Mr. McAllister here? A. Yes, sir.

Q. Did he ever work on your crew? A. Yes, he did.

Q. Do you know about the time Mr. McAllister fell on the Stephens, about that time when it happened? A. 684 I heard about it.

Q. At the time or close to the time? A. Well, I think so, if I remember correctly. I've been hearing a lot about that.

Q. Did he work for you before or after that time? A. He worked for me after.

Q. And was he, after that time, was he the engineer on occasion on your crew? A. At the time of his accident?

Q. Yes. A. Yes, he worked as engineer on my crew.

Q. On your crew? A. That's correct.

Q. Now, then, did you find him to be a good employee, a good man? A. I certainly did. I didn't find anything wrong with Mack's work. Mack was an exception. He did his work real well.

Q. Alright, now, then, I will ask you, Mr. Rosson, if you are familiar with the super-structure and the hull and compartments of the Stephens? A. Yes.

Q. I will ask you whether or not, do you know the location and are acquainted with the conditions—well, I'll strike the part about the conditions, if you know the
685 location of the two windows on the port side which are above the galley space on the Stephens? A. Yes.

Q. And those are these two windows which I am pointing to on this model, is that right? A. That is right.

Q. Now, describe, if you will; the construction of those windows with reference to the frames, the fasteners, the hinges, the drip pan or lip pan, and things of that type.

The Court: I think we have evidence of the construction. Let's go on to something else.

Mr. Bolton: I will withdraw the question.

Q. I will ask you whether or not during the time that you have been on the Stephens, you have observed water in the drip pan below the two galley windows on the port side.

A. Yes, I have noticed water in that drip pan on occasions.

Q. On occasion. First, I will ask you whether or not the Stephens had water in the drip pan all during the time it was in use. A. All the time the boat was in use, you mean?

Q. Yes. A. No, not all the time. There was a lot of dry weather.

Q. Well, now, then, when would that water be there according to your observation, what would it follow? A.

Well, if you were offshore and you had a rough sea
686 and a driving wind against those windows, you would get some seepage, leaks.

Q. Did it take a rough sea before you got any water against the windows? A. It took a fairly good sea and what caused the leak in most cases, I think, was the wind velocity holding the water against the glass and the seams.

Q. The ordinary spray that you got, unless there was a heavy wind, would not seep through the window, is that right?

Mr. Mandell: We object to that as leading.

The Court: I sustain the objection.

Q. Mr. Bolton: What would happen if you had spray and no strong wind blowing towards the port side of the vessel? A. If you had a strong wind, you say?

Q. No strong wind, but spray. A. Oh, no strong wind. You may get a little seepage, but I would think it would be very little.

Q. Is that based on what you have seen? A. Yes.

Q. Now, then, if in addition to having spray in large quantities, you had a wind of high velocity against the port side of the vessel, what would happen then? A. Well,

if you had just a little spray, you could stand quite
687 a bit of wind and not get too much water in there.

You would get some, and with a heavy spray, naturally the more water you get on there, the more wind, the more seepage you would have.

Q. Now, then, how much water? Do you mean by much water in terms of the capacity of that drip pan there? A. Well, if you got a sheet of water on those windows with a strong wind—

Q. I believe you misunderstood me. You said you wouldn't get much water. Now, that is terms of water in the drip pan itself, can you describe that maybe in terms of cups or gallons or quarters? A. Well, that would depend on the time element involved. If you were in that situation for several hours, you would eventually fill that trough up, or it wouldn't take several hours, within an hour and a half, depending on how heavy your sea is and how long you are in that situation.

Q. Well, in your experience, what do you estimate to be the shortest length of time that you have ever observed that boat in that sea to fill up the drip pan, the shortest length of time? A. That is hard for me to answer. I think it would take you a half hour or better before you would fill up that pan. As I remember, that pan, I think, is about
688 an inch and a half deep and the length of the windows—a half hour—

Q. Would be the shortest length of time? A. I think so.

Q. And then of course any time longer than that, it might do likewise in the same sequence, is that right? A. What was that question?

Q. Well, I just withdraw the question. Now, how does water get from the drip pan? A. Well, it down the drain-holes leading on the outer deck, it's approximately a quarter inch hole that is drilled through the side of the superstructure into a corner of that pan, the rear corner of that pan.

Q. Would that be at about the point on the model that I indicate here? A. Yes, that's about right.

Q. And it is a quarter of inch hole drilled through the super-structure? A. As I remember, I would say it is at least a quarter of an inch hole.

Q. And that is a drain for the pan, is that right? A. That is right.

Q. Now, how long has that drain been there, if you know? A. I think Captain Dressel put that in, but I really couldn't say when. It has been since the boat has been in Morgan City.

689 Q. Well, do you know whether it was before or after Mr. McAllister fell? A. I really don't know.

Q. Allright, now, then, would water on occasions, water which had collected in the drip pan on occasion slosh out of the pan? A. Yes, on occasions. If your pan is filled up an you had a roll, your water would slosh out,

Q. You have seen that, have you not? A. Yes, I have.

Q. Now, then, where did that water fall as it sloshed out of the pan, if you know? A. It would fall down into the galley and wind up on the galley deck.

Q. You know the location, do you, of the landing and top step of that ladder leading down into the galley? A. Yes, sir.

Q. Have you ever seen water get out of the drip pan and get on the top step of the ladder? A. Not drip directly on the ladder.

Q. Is it possible for it to drip directly on the top step of the ladder? A. I don't think so, from the galley window.

Q. Now, you said not directly. Have you seen water which did indirectly come from that source and get on that step? A. I imagine I did. I didn't pay any particular attention to it, but if you had traffic through your galley and on your steps, it is very possible that there was water tracked.

Q. That water would have gotten there by being tracked there, is that what you mean? A. Yes.

Q. Now, then, were these windows frequently opened? A. When we first received the boat, we used to open them quite a bit during the summer months for ventilation, and we began to have trouble with them. I mean opening and closing the port or window, you will get some seepage and leaks, and we just decided to quit opening those windows altogether and seal them off as best we could with paint and

compound, and just made it a practice not to open those windows.

Q. Now, do you know about when you made that your practice? A. Well, let's see, we brought the boat down in December 1949, and of course in the wintertime, we hardly needed that ventilation. I think it must have been the summer of 1950 that we were in a practice of opening and closing those windows, and it is very logical that we decided against it in the early part of the winter months when the rough weather usually sets in.

Q. Now, then, Mr. Rossen, with reference to those windows, whenever you knew it was brought to your attention

that water was coming in, in any quantity, which
691 was greater than you knew about having gotten
before,—in other words, if you felt like repairs were
needed or indicated, did you obtain them on those windows?
A. Yes, sir, we always have done our best to keep our
boats in pretty good shape, and whenever possible and we
had time, why we would naturally take care of the situ-
ation like that as best we could.

Q. Yes, sir. And what would result after you had
worked on it? Would that improve the situation for a
while or not? A. Oh, yes, it would improve it.

Q. And what would those repairs consist of, or main-
tenance? A. Well, the first thing you would do was to try
to tighten the dogs on the window, pull the gasket a little
tighter, and I remember of having some trouble with those
dogs; if we twisted them off, we would get a new one made
and put as much strain on it and tighten as tight as we
thought the dogs would stand.

Q. Now, would that result in any change in the condition
of seepage or leaking around the window when you did
that? A. Yes, sir. I think we improved it.

Q. Would that improve it? A. Yes, I think we improved
it, because I don't think we were working for nothing. We
were trying to do good.

692 Q. You worked until you thought you had im-
proved it, is that right? A. Yes, sir.

Q. Now, you spoke of twisting a bolt off, can you tell me
when that happened? A. Oh, it has happened on several
occasions. I wouldn't know just when.

Q. Can you tell me when was the first time that hap-
pened? A. No, I really couldn't.

Q. Do you know whether that happened before or after Mr. McAllister had his fall? A. I am pretty certain we rung some of those bolts off before Mr. McAllister had his fall.

Q. That is your best judgment that you did? A. Yes, if I remember correctly, the original ones were made out of aluminum and we tried brass.

Q. What do you have on there now? A. I think what we have on there now is Monel. I'm not positive, but I am pretty sure it is.

Q. Now, from time to time, if that did happen, you would replace the defective bolts with a different bolt? A. Yes, sir.

Q. Now, how long would it be between the time it broke and the time you were able to get it replaced? A. Well, that's hard to tell, on a small item like that, we usually get pretty prompt service.

Q. Within a day or two or three or four, something of that time? A. Oh, yes, sir, within that time, I think.

Q. Now, I am directing your attention to the third window aft on the port side, which is the window the testimony has shown is above the landing at the head of the galley steps, what was the condition of that window, with reference to weepage or seepage or permitting water to pass? A. Well, the best of my recollection, we never made a practice of opening that window, and it has always been in fair shape.

Q. Well, by fair shape, how would that be with reference to permitting water to pass through? A. Well, I would say that it never did take enough water to justify doing anything to it.

Q. Do you remember ever seeing water on the inside of that window? A. You mean from the gasket leaking or what?

Q. Well, from water that came in about the window itself? A. I have seen a little water, might have been a drip, a slow drip.

Q. A slow drip? A. Yes, sir.

Q. How much water would you estimate that you have seen drip in there at one time, in terms of some measuring quantity we all know? A. I don't think

I have seen over a half a cup of water that could have come in through that window at any time.

Q. The worst time that you can remember, your estimate of the water is that there might have been as much as a half a cup, is that right? A. Yes, sir, there might have been that much.

Q. What was the wind and wave condition which had preceded that observation by you, if you know? A. Well, that would also take a pretty good sea, a pretty good sheet of water on that glass and a wind against the glass and the water, to force it in. That window hasn't never given us much trouble, that particular window.

Q. Would that condition have to exist for any length of time in your opinion before water would begin to come through on the inside of the boat? A. Yes, to amount to anything, I think.

Q. Do you think that one head-on wave or one wave striking directly over the window would have produced water seeping through the window? A. Very little.

Q. Well, how much is a little? A. Oh, a few drops.

Q. Just a few drops? A. Several drops, I would say. Are you speaking of one wave?

Q. One wave. A. Yes.

Q. Now, then, is this water that you have testified you have seen there then in quantities maybe as much as a half cup, the total of the water which had leaked in over a period of time when the waves were as you have described them? A. Let's see, come again with that, please.

Q. You said that one wave would produce, if it struck straight ahead, struck the window, would produce a few drops of water? A. Yes, sir.

Q. And continuous wave action over a period of time, what would that do, of the same character of wave action?

A. Indefinite time? I mean what age you talking about?

Q. Well, over a period of a half hour, let's say. A. You would get a little water.

Q. Would you get as much as a half a cup of water? A. I think you would possibly get as much as a half a cup or possibly a little more.

Q. Alright, if you had waves striking it in regular wave action, is that what you mean? A. Yes.

Q. With the wind there too? A. Yes.

Q. Now, do you ever remember a time when the Stephens was operated in that condition? A. Yes, I do. I have been in some pretty rough weather.

Q. Was that in unusually heavy weather? A. Yes.

Q. What kind of seas would you have on those occasions?

A. Well, if you drove that boat into a sea or—off of your port quarter there—say, an 87ths—9 foot sea for a period of, well, our runs are fairly short. I would stay for an hour and a half or two hours, we could get out of that kind of weather from any of our locations—you would get a little more than a cup of water or a half-a-cup, I think in conditions like that, you would get quite a bit of water.

Q. But you never have seen that kind of water coming in that way, have you, in that amount?

Mr. Mandell: We object to that, Your Honor, as leading and suggestive.

The Court: Objection sustained.

Q. Mr. Bolton: Well, have you ever seen that amount of water, over one half a cup through that window? A. I couldn't say whether I have seen that much water come in through that window or not. I never stay there that long to watch that window.

Q. Alright, that's all.

767 GEORGE ROSSON, being recalled to the stand, testified as follows:

Direct Examination

Continued by Mr. Bolton:

Q. Mr. Rosson, with reference to the window in the companionway on the port side of the vessel, do you know which one I am talking about? A. On the port side.

Q. And which window? A. The galley window?

Q. No; the one behind the galley, the single window behind the galley. A. Yes.

Q. Do you know whether that window has ever been repaired or not? A. The only knowledge of repair to that window that I know anything about, is last summer, early part of last summer or spring, all of the windows were taken out of the Stephens and worked on.

Q. At that time was the hull being sand blasted? A. No,

not the hull, the super structure was being sand blasted, after the windows were taken out where the windows flanged to the super structure.

Q. And that, at your knowledge, is the only time
768 that window has ever been removed or worked on,
is that right? A. Yes, to my knowledge:

Q. Now, then, Mr. Rosson, out at Eugene Island Light, and from there to Beacon Seven, what is the compass course? A. The compass course is 210 degrees.

Q. If this diagram which appears on the blackboard over there, if in this diagram, north is at the top of the board, and if this represents—these lines running this direction, represent the wind waves present at this time, and they had wind waves that were two to three foot waves, and if there is at time a roll or swell of one to two feet represented in such manner as these lines would be drawn, and if your vessel is proceeding from Eugene Island to Beacon Seven, at approximately eight miles per hour, the Stephens, and if you had a wind out of the northeast going from northeast to southwest at thirty to forty miles per hour, do you have an opinion as to whether the Stephens would be taking any water over the bow or along side those windows? A. No, I don't think she would be taking any water over the bow or on that side. She may be taking a little spray on the stern.

Q. A little spray over the stern. Is there any way that you know that water that might be in the ship on the wheelhouse deck, could get through upon the top step of
769 the ladder leading from the lounge to the galley?

A. Did you say from the wheelhouse?

Q. From the wheelhouse deck or from the wheelhouse. A. No, I think not. There is combing there that would prevent that.

Q. Does the wheelhouse deck extend over the ladder that we are talking about, the galley to the lounge? A. No, these steps are just below the seat in the wheelhouse, on the port side of the wheelhouse.

Q. And there is no deck under the seat, is there? A. No, the bottom of that seat is overhead.

Q. Allright. A. Of the galley.

Q. Mr. Rosson: Have I asked I asked you how you go down this ladder? A. Yes, sir.

Q. Since you have been on the stand here? A. No, sir.

Q. Would you please describe how you step from the deck onto the first step of the ladder, if you know, the ladder going down into the galley. A. Well, in that particular case, there is a handrail on the port side of the passageway going down, and I have been going down forward, and I get as much of my foot on each step as possible.

770 Q. Do you have to turn your foot to do that? A. Yes.

Q. Now, do you know which foot you would normally step with, do you remember that? A. No, I couldn't answer that.

Q. And do you have hold of the rail at the time you step? A. Yes, I think I am pretty well in the habit of holding onto that handrail.

Q. Now, then, just one other general thing I want to cover and I think I am through. What is the depth of the water in the area of Beacon Light Seven outside of the channel? A. That channel itself was dredged at one time, it has been several years ago, to twelve feet, but as we know, there is a lot of sediment in that river, and I think the average water in the channel now would be about ten feet; and you have a couple of feet of soft mud, but it is a little shallow for fifteen or twenty minutes beyond the Beacon.

Q. Alright, sir, but that's in the channel that you are talking about? A. Yes, sir.

Q. Now, then, outside the channel on either side in the area around Beacon 7, how deep is that water? A. It is a little shallower if you get away from the buoy, maybe a couple of feet difference.

771 Q. So if the channel was ten-feet deep— A. We have eight, seven or eight or each side of the channel right at Beacon Seven.

Q. Now, then, what happens to the wave action in that area at that point when you a strong northeast wind, say one that is thirty to forty miles per hour, or twenty-five to thirty miles per hour? A. You will get a little choppy sea in there.

Q. What size waves will you have? A. Oh, you could build up two and a half to three feet in there, I think, as far as Beacon Seven, two and a half feet I would say, would be about the maximum.

Q. Alright, now, then, is that as much waves as you have seen down there in that area with a strong wind off the land, I mean in the area of the Beacon Light? A. I don't think I've seen more than two and a half foot in there, that is from the north.

Q. Yes, sir, from the north and northeast, is that right? A. That's right.

Q. Now, then, if the wind is from the other direction do you get a different result? A. Yes, you can get a pretty good ground swell in there with a southerly wind, your ground swell can roll us in there. I have seen, I can say safely, three and a half or four foot ground swell.

772 Q. Is that as much ground swell as you have ever seen with the wind out of the south in there? A. Just about.

Q. Now, then, one other question; what is the worse sea that you have ever been on the Stephens during? A. Well, we had; I think it was in September, we had a hurricane.

Q. What year? A. That was this past year.

Q. Alright. A. And about eighteen foot without too much exaggeration, of course the boat men like to exaggerate, and some of the fellows say it was twenty to twenty-four, but I judged it to be about eighteen feet.

Q. During that time were you ever feeling like the ship was in danger? A. No, I didn't feel like the ship was in danger; but I wasn't feeling too good myself.

Q. Alright, that's all.

Cross Examination

By Mr. Mandell:

Q. Mr. Rosson, you are the recognized Master of the J. C. Stephens or were at that time? A. At that time and still am.

Q. In other words, the papers carried your name as the Master? A. That is correct.

Q. And you do know that the windows or the port holes on the port holes were not water tight? A. Which windows are you referring to?

Q. These three windows right here on the port side? A. Three windows?

Q. Yes. A. That square window was in pretty shape. Now, the other windows, those over the galley, were not in as good shape as this square window.

Q. Did water come through that larger window? A. It depends on the situation. In that eighteen foot sea I imagine we did take some water through that window.

Q. Talking about—does water come through this large window over the top stair there before that time? A. I don't quite follow you now.

Q. Well, did you tell Mr. Bolton that? A. You mean at any time?

Q. Yes. A. Yes, on occasions it has.

Q. It doesn't have to be eighteen foot waves to wash against it? A. It wouldn't have to be eighteen foot, no.

Q. So these three windows, depending on how much water you got there, were not water-tight, that's true, isn't it? A. I will say they were not perfectly water-tight.

Q. And it is also true that you saw water on these steps leading from the lounge to the galley? A. I have seen water on the steps.

Q. And that drip lip or the drip pan or whatever you call it, over these two windows on the port side which you say were about an inch and a half deep, you did see whether it was full of water from time to time? A. At times, yes.

Q. And you did see when the vessel would roll or pitch, water would slosh out? A. That's correct.

Q. And get on the deck? A. That is correct.

Q. And get on the steps? A. On a portion of the steps.

Q. And people would track that water up and down the steps? A. That is right.

Q. Now, these are the same steps we are talking about from which Mr. McAllister slipped and fell, is that right?

A. That is what I understand.

Q. Now, do you remember when a Mr. Bush with Mr. McAllister came to see you in Morgan City? A. I remember a gentleman coming with McAllister to see me. I don't recall his name.

Q. He told you he was from my office? A. Yes, I understood that.

Q. And you did tell him that the port holes and windows had a small pan located in board from the lower portion of

the window, that is true, isn't it? A. I said that's the drip pan.

Q. Yes, didn't you also tell him that holes were drilled in them for drain holes? A. Yes, sir.

Q. That was drilled after the vessel was delivered to the Magnolia Petroleum Company and after it was in use for some time? A. I don't know just how long, or when those holes were drilled.

Q. And sometime last year, you did tell Mr. McAllister and Mr. Bush that those holes were drilled since the accident happened, do you remember telling Mr. McAllister that? A. I don't quite remember telling him whether or not they were drilled after or before.

Q. You know that they were drilled some time after the ship was delivered to your Company? A. 776 Yes.

Q. Now, you got the vessel sometime in December; didn't you? A. That's right.

Q. Now, during the summer months generally, you have calm water? A. As a rule.

Q. So, during September, October and November and December the water is kind of rough. A. That's right.

Q. And you have got waves? A. That is correct.

Q. And it was during that time that you experienced water coming through these port holes? A. Now, I couldn't give any definite dates on that, but when I see that water, during my working time,—I practically make a trip every day.

Q. Of course you can't give us the date, because you didn't keep the dates, and you did tell Mr. Bolton that shortly after the vessel was delivered through the Company, it began having trouble with the windows and it was sealed off with paints and compounds. Do you remember that? A. Come back with that, please?

Q. Do you remember when Mr. Bolton asked you a question you told him—"We began having trouble with the windows, These three port holes on the port side, 777 after they were delivered to the Company, and you sealed them all with paint and compound? A. Yes. We quit opening them for ventilation, we dogged them down.

Q. As a matter of fact, Mr. Rosson, some shore employee of the Magnolia Petroleum Company changed that gasket

about a month or two after Mr. McAllister was hurt, on that large window, do you remember that? A. No, I don't remember of anybody changing that gasket on that window. That is very possible; that could have been done on my time off.

Q. Do you know that in 1953 the frames of that large window were taken off? A. Yes, all of the windows were taken off.

Q. In January of 1953? A. Well, I don't know whether it was January 1953 or not. When all of the windows came off was in the Spring of 1954, to the best of my memory.

Q. Now, did you see like Captain Dressel did, water dripping through the ceiling on the overhead of the galley? A. I don't know what Mr. Dressel saw, but I have seen water drip from the overhead into the galley.

Q. And it dripped on the galley floor? A. That is correct.

778 Q. And that was tracked up the stairs? A. It could possibly have been tracked up.

Q. Sometime after that, you put strips over the place where—alumintum plates covering the overhead were put together? A. Yes.

Q. They were not there at the time Mr. McAllister was injured? A. No, they had just been put on there recently.

Q. And you also testified when Mr. Bolton asked you some questions, that from time to time you tried to pull the gasket a little tighter, how did you go about pulling the gaskets a little tighter? A. Well, when these windows come out, they had wing nuts on them, thumb screws, if you know what that is, and we tightened them as much as we could and we would ring them off once in a while and replace them and we put a hex nut on them later on.

Q. Put a what? A. A hex—a hex shaped nut and used a wrench.

Q. Well, what did that do to the gasket? A. Squeezed the gasket a little tighter and should have helped it, and made it a little more water proof.

Q. But if it didn't still make it water proof, water still came in through, didn't it? A. Not completely. 779 water proof. There was some seepage.

Q. Mr. Bolton asked you whether you ever saw water coming through that large window, and I marked down exactly what you answered—"I have seen that large

window leaking as much as a half a cup of water at a time." Do you remember telling Mr. Bolton that? A. What do you mean "at a time"? Do you mean over a period of time?

Q. Over a short period of time. A. Yes, over a period of time.

Q. Now, that window was right smack above the first step, wasn't it? A. I don't know if it was right directly above it or not, it might be a little aft of it.

Q. I show you Plaintiff's Exhibit No. 9, do you see these two windows? A. Yes.

Q. Do you see this window? A. Yes.

Q. This is the window we are talking about? A. Yes.

Q. Is that correct? A. It appears to be directly over it.

Q. And that is true, you were on that boat, you were there? A. Yes.

780 Q. You say that as you walked down those steps there on the port side, going down, that you try to put your foot like this? A. That's correct.

Q. Put your hand down on the handrail! A. Yes.

The Court: You'll have to speak out so the Reporter can hear you.

Q. Mr. Mandell: And as you do that, you have to bend down a little bit, do you not, because that handrail is a little bit low, like this? A. Well, I don't know whether I would have to bend down or not. I would grab that handrail from the under side.

Q. From the under side? A. Yes, I think I could get a better grip on it, with my hand turned to the left a little.

Q. Alright what happens to you when you use your right foot, like this? A. Well, in that case, you would probably catch it.

Mr. Bolton: Just a minute. I object to that motion, since this was his left foot, and he asked him about his right foot.

The Court: Overruled.

Mr. Bolton: Note our exception.

Q. Mr. Mandell: When you use your left foot, 781 what do you do? You are faced just the opposite way? A. I don't know whether I used my left foot or not?

Q. Well, you told the Jury you don't know which you

use, whether you use your right or your left? A. I don't know exactly which I am using.

Q. You sometimes use your left? A. Sometimes I use my right, I imagine.

Q. We have agreed on that. Do you sometimes use your left? A. In going down that ladder?

Q. Yes, sir. A. I really don't know.

Q. Well, if you do use your left, how do you hold on to that handrail, that's all I'm asking you? A. Well, I haven't noticed it being too inconvenient to get ahold of that rail.

Q. The rail is to your left, and you turn your face to the other way and that is how you hold on? A. I don't know.

Q. You don't know? Alright. A. I would have to get on the steps and start down before I could tell you exactly how I come down the steps.

Q. Now, then, there is a grab rail ahead of you, isn't there? A. That's right.

Q. You can't reach that from the first step, from 782 the top step, can you? A. I really don't know. Personally I don't use that top rail but very little, the top handrail, but very seldom.

Q. Do you know where the drilling barge was located during October 1950 when it was somewhat beyond the No. 7. Beacon? A. I was off duty at the time, but I heard so much about this deal that I have a pretty good idea where the Barge was.

Q. Well, it was located a little bit to the east of Beacon No. 7, wasn't it?

Mr. Bolton: If the Court please, I am going to object to that. He just said he doesn't know by personal knowledge.

The Court: Objection overruled.

Mr. Bolton: Note our exception.

Q. Mr. Mandell: Well, if it was located a little bit east of No. 7. Beacon, as the testimony shows, and this is north, south and east and west, then your boat coming from Eugene Island to No. 7. Beacon had to go in this direction like I have it, east, wouldn't it? Would it not? A. If you were going down the channel to No. 7. Beacon and you had a barge east of the Beacon, yes, you would have to turn east to go to the barge.

783 Q. And if the wind was thirty to forty miles an hour northeast, then the wind and the spray would be coming right against the port side of the vessel? A. Yes.

Q. And then if you wanted to turn back and go to Morgan City, you would go right back northeast in the face of the wind? A. You run back west as far as the Beacon, you would run east over to the Barge.

Q. Alright, then wherever you would be, you would head east, you don't have to go back over to the Beacon, do you, you could go straight, couldn't you? A. It is not a good policy with that boat. That is shallow water in there, and it is best to get over by the Beacon and go up the channel.

Q. How much water do these drilling barges draw? A. It depends on how they are loaded. Light, I think you can get a drilling barge up about three feet. When she is loaded, you can load her down to, oh, I guess as much as nine feet. I think I have seen some loaded to nine feet.

Q. Is it true when they are loaded, they draw, the barges draw when they are loaded, fourteen feet of water? A. Well, now, that depends on how heavy you load them. The load line, I don't exactly know the draft on loadline.

784 Q. Alright, then, you don't know. In any event, if the boat is going northeast, and the wind is coming from northeast against it, then the sea and the spray would be meeting the boat, would it not? A. That is correct.

Q. And as the boat goes forward and the wind against it, the spray would be carried by the wind and dropped on the boat, is that right? A. Yes, sir, if you had enough wind it would.

Q. And that would fall right on those port holes, wouldn't it? A. If you run headon into the sea.

Q. And you have the sea and the wind carrying it, it would fall right on here? A. Yes.

Q. Those are the kind of occasions in which you would get water through those windows? A. Yes, if you had rough enough weather and enough wind.

Q. Well, a thirty to forty miles an hour wind, is a pretty good wind, isn't it? A. That's a pretty good wind, yes, sir.

Q. You have been on that boat as Captain and many times you have used that wind shield wiper on these front windows, didn't you? A. That's correct.

785 Q. Because the water—the spray would come over it? A. Yes.

Q. Answer out loud; please sir. A. Yes.

Q. And you have seen water coming through those windows from the wheelhouse and get onto the deck of the wheelhouse? A. Yes, we have had leaks through the front windows.

Q. And the water from the wheelhouse deck would get onto the deck below in the galley? A. That is correct.

Q. Do you know why these bolts that were broken off were not replaced with the same kind of material? A. Well, we decided brass, the first time we changed them, would be stronger than aluminum; we could pull them down tighter.

Q. You noticed that the aluminum dogs were corroded, didn't you, that's why they broke off? A. Yes, if you leave them over a period of time, they form corrosion and the nut will freeze to the bolt and it will break the bolt, before the nut will come off?

Q. Had you noticed corrosion around the frame of the window? A. Some, yes.

Q. Mr. McAllister worked under you as an engineer, did he not? A. That's right.

Q. And under Captain Dressel as an engineer? A. Yes.

Q. And he was a good hand? A. He certainly was, yes, sir.

Q. And he kept his engineroom clean? A. Yes, he sure did.

Q. And he was very careful about his work? A. That is right.

Q. And you have seen them coming off the drilling barges onto your boat? A. Yes, sir.

Q. And you have seen some of them coming in and bringing in lots of mud and oil? A. No, sir, not much of that on the crews we carried.

Q. I can't hear you, sir. A. No.

Q. None at all? A. Not—well, I would say not at all, you see we carry crews.

Q. Yes, sir. A. And we go out to pick up a crew that is coming to town and they are cleaned up, they are dressed up, they are ready to go home and most of them have their

dress shoes on. In fact, I would say all of them
787 have their dress shoes on.

Q. But from time to time, you have seen them bring in mud and oil on your boat? A. From town, mostly. If it rains and gets muddy in the yard, they will track through the mud and track through the boat.

Q. And you have seen them bring in mud and oil and grease and dirt in off of the barges from time to time? A. A little, I will, say, they might go through a little oil and then bring it on the boat.

Q. And you have seen these men walk down the stairs, from the lounge to the galley to get into the galley and sit down there? They were ready to go down there, weren't they? A. Oh, yes, they could go down there.

788 RAYMOND L. VANDEVEER, a witness produced by the Defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Bolton:

Q. What is your name? A. Raymond L. Vandeveer.

Q. Where do you live? A. Dallas.

Q. What is your occupation? A. I am a Consulting Chemist.

Q. And with what Company are you affiliated? A. Allied Analytical & Research Laboratories.

Q. Is that a Corporation? A. It is a corporation.

Q. Are you an officer in that corporation? A. I am.

Q. What is your position? A. Vice president.

Q. What is your business in that occupation? A. We are scientists. We consulted by various industries throughout the country. We make tests and obtain facts.

Q. Is your laboratory generally referred to, or those like yours as Independent Testing Laboratories? A. 789 That is correct.

Q. Now, then, where did you get your scientific education? A. At Northwestern University.

Q. In Chicago, Illinois? A. In Evanston, Illinois.

Q. When did you graduate from there, if you did graduate, and with what degrees? A. I graduated in 1931 with a Bachelor of Science degree.

210

Q. And what were your major and minor subjects? A. I had a major in Chemistry and a minor in Physics.

Q. And after that time, did you pursue Chemistry or Science? A. I did.

Q. And outline hurriedly if you will, the employment that you had in that connection since that time to now. A. In September 1931, I was employed as a Junior Chemist at the U. S. Food & Drug Administration, in Chicago, Illinois.

Q. In 1937, I was assistant to the Chief of the Central District of the U. S. Food & Drug Administration for a period of one year. In 1938, I was appointed Chief of the Laboratories of the New Orleans Division of the U. S. Food and Drug Administration. In 1944, I was appointed Assistant Chief of the Chicago District of the U. S. Food & Drug Administration. I resigned on February 6th, 1945.

Q. And is that the time that you became affiliated with your present organization? A. For one year, I was 790 associated with the Dallas Laboratories in Dallas, Texas.

Q. Did they do similar type work? A. That is right.

Q. And since that time you have been with your present connection which is the corporation of which you are the Vice President? A. Yes, sir.

Q. Hand you Defendant's Exhibit No. 2, and ask you whether you have ever had occasion to have that exhibit in your possession before? A. Yes, sir, I have.

Q. Will you explain how it came to hand, and what you did in connection with it? A. On or about January the 21st, Mr. Marlow of the Magnolia Petroleum Company telephoned and asked me to come down to his office. At his office he handed me this step and this portion of a step. They were not on this board at this time. I took them back to the laboratory and affixed them to this particular board.

Q. Did he ask you to make tests with reference to those metal pieces that you have there? A. Yes, he did.

Q. What type of test did he ask you to make? A. He asked me to make friction tests on these metals.

791 Q. Now, by friction tests, what do you mean in the ordinary language? A. Well, in ordinary language, friction of course is the resistance to motion, when one object is placed on a surface, the reason it resists motion is because of friction between the two objects.

Q. Did you then take the step and did you devise a procedure for making such test? A. I did.

Q. Now, if you will, will you describe the procedure that you used in friction tests of those steps? A. Well, in the first place, I cleaned the step thoroughly, because we didn't want any foreign matter there between the objects which I was going to use as testing material and the steps.

Q. What did you use to clean it with? A. I used water, a detergent, and finally Hexine.

Q. What is Hexine? A. Hexine is a petroleum hybrid product which will dissolve any oil or grease it may touch.

Q. Alright, what substances—I will ask you, if you used a leather shoe sole to test its friction in contact with those surfaces? A. I did. I had a leather shoe sole affixed to a block of wood.

792. Q. Where did you obtain the leather shoe sole?

A. From a shoe store in the neighborhood.

Q. Was it new or old? A. It was a used shoe sole, from an old shoe.

Q. How did you affix it to a block of wood? A. By nails.

Q. Then what did you do after you had affixed a leather shoe sole to a block of wood? A. I cleaned the surface of the shoe sole to be sure it was clean, to reproduce a test, we have to be sure after each series of tests that the shoe sole is still clean, that there is no other foreign matter that comes between the object to be tested and the surface to be tested. Then I affixed a screw eye in the piece of wood to which the sole was affixed. I devised an H frame which I screwed this on and set it between the door jam.

Q. And what was your H frame constructed of? A. Two by six's.

Q. And this piece of wood, containing the step, was mounted— A. It was screwed onto the H frame, so that it sat in this position, but only six inches from the floor.

Q. Then how did you fit your H frame? A. I secured it in the open doorway.

Q. Secured it in what manner? A. Between one of our laboratories, I just nailed the block on one door jam, 793 which kept it from coming through the door.

Q. After you had secured it, then, the H frame would not move? A. It would not move in, I would say this direction toward me.

Q. Now, then, how did you affix—in what direction did you affix the leavings of that step tread? A; I affixed it in this direction toward me. I knew it was the leaving edge because of the evidence of wear on certain parts of the edge of the step. It did not make any difference, on this one, as this has not shown any wear.

Q. Did you then pick certain areas for your tests on your step there? A. I did, because there may be a difference in the, what we call the friction between each area depending upon the wear of these surfaces. I marked on the block here, Position A, and at this point, a position B, and at this point was position C.

Q. Now, with reference to the point of maximum wear, did you make a test where you looked and determined to be the most worn part of that step? A. Yes, sir, that was position B.

Q. Alright, sir, now having marked your test spot and having mounted your shoe sole and placed an eye bolt in the board to which the sole was mounted, what 794 then did you do? A. On this block of wood which was a two by six under which was the sole, I placed lead ingot which weighed approximately fifty-eight and a half pounds. Then I affixed a pulley to this eye bolt and passed a rope through it. I secured one end of the rope and we put a spring scale in between the pulley and the block, so that when we pulled on the rope, the spring scale would show an amount of pull in terms of pounds.

Q. You were then able to measure the number of pounds of pull that you exerted against your test sole, is that right? A. That's right, which when it moved, I recorded the number of pounds it took to move, to start that movement of that weighted block with the sole.

Q. Now, then, you were able to measure in pounds that pull, what test did you then make with the step dry? A. After cleaning it as I have already described, I let the step dry overnight, and I measured the amount of pull it would take to move this block and weight at position B and at position C, and on this step which I called the new step.

Q. Alright, sir, did you note those results? A. 795 Yes, sir, in each determination I made an average of —I made at least three tests, or three pulls.

Q. Did you in making that average discard any tests which you felt were not properly conducted at the time?

A. In the beginning before I started a series of tests, I made several such tests in order to determine the factors that may influence the variability of the results of different friction between these two surfaces.

Q. Alright. Now, then, have you told us about your weight, the size of it and what it was made of? A. That is correct. It is a lead weight about this long and about that thick and weighs approximately fifty-eight and a half pounds, and the shoe sole and the block weighed a half pound which made approximately fifty-nine pounds that was pressing on this surface through the shoe sole.

Q. Did you determine the weight center of your lead weight? A. Yes, I did, and I marked it with a pencil because is it very important as I found, to put the lead weight on exactly the same spot each time.

Q. Did you make a corresponding mark on your block upon which the sole was mounted? A. I did and I also put it on the same position each time, that is with relationship to the step.

Q. So once you have made your mark on the sole of the block—the block containing the sole, and once you have made the mark on your center weight center of your lead, each time you thereafter made a test, you lined those up in the same position, is that correct? A. That is correct.

Q. Now, then, did you then conduct those tests for each of the positions, A, B and C on the old step and also a test of the same kind upon the new step section? A. I did, yes. I conducted it on B and C because B is the most worn spot and C shows some wear, but not as much. I didn't conduct it on A, because I felt that that was too near the edge.

Q. You could not use it as a step, is that what you mean? A. That is right.

Q. Do you know, or do you have your test results there, that you can refer to, to determine what the average pull was required to move that test set-up as you have described it; but the old step, C location— A. I do have.

Q. Will you refer to that, please, and give us your findings. Point out first the C location again? A. This is the C location.

Q. Alright. A. And the average pound pull was forty-eight.

Q. What did you find the average pound pull to be
797 at the other location that you took on the old step?

A. They were approximately the same. I don't have them recorded here.

Q. They were approximately the same? A. Yes.

Q. Now, then, what did you find with reference to the average pound pull on that test made on the new steps, dry? A. On this dry, forty-nine pounds.

Q. Allright, sir, just one pound difference? A. One pound difference.

Q. Now, then, did you thereafter change the condition of the step by the addition of other substance? A. Yes, I did.

Q. What substance did you first use on the step before making other tests? A. I used plain water.

Q. That's plain Dallas water? A. Yes, that's Dallas water.

Q. And how much water did you put upon the step? A. I poured water on enough to wet it, and wiped it like that.

Q. With your hand? A. With my hand.

Q. Was there water remaining— A. There was.

798 Q. To the saturation point? A. There was quite a bit of water even after the completion of the test. You could feel the wet.

Q. Allright, now, then, between each time that you made the test, what did you do to the sole you were using? A. I dried it with a towel and then, not between each test, but maybe between a series of tests, I had to fan it lightly, because when you pull it over this surface here, there were little tiny groves that would develop, which would give you a different surface, if they were not obliterated.

Q. So each time you sanded your sole to get it to the same degree of fineness with which you had begun your test? Is that correct? A. That's correct.

Q. Now, then, where did you make your test with plain water added? A. I made the test on step location B; I found fifty-two pounds was necessary to pull the weight.

Q. Do I understand you; do you say that it took more pounds of pull to move your test sole after you had added water than it did when you had the dry step? A. That is correct.

Q. Now, then, what was the situation at the other points you tested? A. The step at position C, it took 55.5 pounds to pull on the average.

Q. 55.5? A. 55.5.

Q. That's approximately how many pounds more pull than was required at your dry step C location? A. I found 48, that is seven and one half pounds.

Q. It took seven and a half pounds more pull? A. That is correct.

Q. With water at point C; plain water? A. That's correct.

Q. To move your test block, than it did at point C when you had it dry. A. Yes.

Q. You had put your sole back into the same condition, before making these tests? A. Yes.

Q. Now, then, what did you find with reference to your plain water test on the segment of the new step? A. This step here?

Q. Yes. A. I found fifty-six pounds to be the average pull necessary to move that block.

Q. And you had found twenty-nine pounds when dry? A. That's correct.

800. Q. Was it or not then your conclusion that both the dry and the new step—what was your conclusion with reference to adding plain water to the dry in the new step compared to the old and new step, compared to testing your same step dry? A. The addition of water on these steps when a leather sole is placed on them requires more force to move that leather sole.

Q. Can you say what that would mean in terms of slipperiness? A. Yes, it is less slippery with water on it than it is dry.

Q. Now, then, did you add any salt to water and attempt to test that? A. I did.

Q. How much salt did you use? A. About three per cent of three and a half per cent.

Q. How did you arrive at that per cent? A. That is the approximate composition of sea water, of the salt in sea water.

Q. Yes, sir. A. That is the percentage of salt in the sea water.

Q. Did you repeat your test with that solution? A. Yes, I repeated it. On position C, I've recorded here, with sea

water it took fifty pounds to pull, and with the new step, it took fifty-two pounds to pull.

Q. What did you find as to comparison between sea water and plain water? Was there or not a substantial difference? A. There is not a substantial difference between the two.

Q. Alright, sir. Did you make any other tests with a solution of anything else? A. Not a solution but I took a sample of crude oil and applied it to the surface and tested the surface for the amount of force that would be necessary to move that block with the weight as I have described it.

Q. Now, then, how much crude oil did you use in making this test? A. At each location approximately a teaspoonfull and then I wiped it with my hand.

Q. A whole teaspoon full of crude oil? A. That is right.

Q. Was placed on the step at each location? A. That's right.

Q. Was the step then wet? A. No, the step was dry. I had cleaned the step off in between the sea water test and this.

Q. So then you put crude oil on a dry step and rubbed it around on the test step? A. That's right.

Q. Then what did you do? A. Then I placed the leather sole on the surface and then I made the pull test as I have described it.

Q. Alright, now, then, at old step point B in making the oil film test, where is that and what was your result? A. Here is old step point B. This appears to be about the most worn part on this step.

Mr. Mandell: Just a moment. If it please the Court, I don't think there will be any evidence that would make this evidence admissible and I submit to Your Honor that none of this evidence is admissible because it is shown that none of the same conditions existed at that time, and the simulated condition was entirely different and therefore that it is irrelevant, immaterial and prejudicial.

The Court: It is a question of credibility. I will overrule the objection.

Mr. Mandell: Note our exception.

A. I made a test on position B of this old step. The pound pull was 47.

Q. Mr. Bolton: And that compared to what pound at

the dry step test. I believe you said you didn't have that noted though. A. Not on position B, no.

Q. But I believe you said that was approximately the same as at old step position C. Is that correct? A. That's correct.

Q. And that was what? A. At old step position 803 C was 48 pounds.

Q. One pound difference. It took one pound less to move your test weight and test sole with a teaspoon full of crude oil at old step position B than it took with that same position dry. A. That's right.

Q. Then what did you find with reference to the oil film and the test made there on at old step position C? A. I took another teaspoonful of oil and treated the surface as I have described. I wiped the block off this time and sanded it lightly because this oil had permeated somewhat onto the sole.

Q. Yes, sir. A. And I made the test and I found the average to be 57 pounds.

Q. You mean that at that point you found that it took more pounds pull to move that block than it did when it was dry? A. That is correct.

Q. Did you test that just one time or did you make several tests? A. That is the average of three pulls on this series of experiments and those results did not vary more than one pound either way, for example 55, 56, 58, or 56, 57 and 58.

804 Q. And is that true of each of the tests that you have outlined? A. That is true.

Q. Alright, now, then, did you put some oil in the same amount on your test spot on the new step? A. On this new step, yes, I did.

Q. What result did you get there? A. I found fifty-three pounds on the average was necessary to pull that weight from this step. I mean to start it in motion, not necessarily pull it off.

Q. Now, is this in your opinion a scientific method of making these tests? A. Yes, it is a scientific method and it is an accepted method of making the tests.

Q. And were you satisfied that you had been able to properly perform the tests? A. I am satisfied that I did perform them properly.

Q. And do you think that the results which you obtained are scientifically correct measurements of the sound pull required to move that block under those conditions? A. Under the conditions I have described, yes, sir.

Q. Now, then, could you have made the same test with any weight whatsoever on your test block? A. Would you mind saying what weight?

Q. Well, any weight in excess of the weight of the sole of the shoe. A. I did so.

Q. Well, what I am driving at—does the weight that you put on that test block make any difference in the validity of your test? A. The more weight that is on this sole, the more pull, or pound pull is going to be required to move that weight, but it will be proportional. That is, it will divide the weight that is on this particular block into the pounds of pull, and we will get what we call a constant, which is a co-efficient of friction? A. Yes, that's right.

Q. And that result will always be in what relation to one? A. It will be less than one on a series of tests like this. Of course if you are pulling up hill, that would be a different story. I might say that if I put one hundred and sixty pounds on here, it would require less than one hundred and sixty pounds pull to pull a person off of this step.

Q. But would the amount of pound pull that was required to pull that 160 pound weight man, divided by the weight of the man, give you the same co-efficient of friction that you obtained by these tests that you have outlined with the lesser weight? A. If I got the same co-efficient of friction, yes, sir.

Q. Did you actually experiment with a man standing on that step? A. Yes, I did. I stood on it myself.

Q. And you permitted yourself to be pulled until you slipped? A. That's correct.

Q. Why did you abandon that method of test? A. Because, I used that method of test several times, and I abandoned it because in each instance after a few tests the shoe sole was scratched so deeply that we were getting surfaces than we started out with.

Q. And was your co-efficient of friction getting higher each time? A. That's right, it was getting higher.

Q. And that meant that it took more pounds pull in each test than it did in the preceding pull? A. That is right.

Q. And for that reason then you say you change and went to the test which you first outlined with the fifty-eight and a half or fifty-nine pounds less weight? A. That's right.

Q. From these tests did you reach a conclusion as to the effect of the addition of plain water, the addition at a different time to an otherwise clean step of dry water—
of sea water—and at a different time, the addition of
807. the oil film as you have outlined? A. I reached
a conclusion based on the facts as I have described.

Q. And what is that conclusion? A. That the dry step it is a little easier to move the weight off of it than if the step is wet either with sea water, plain water, or oil.

Q. Translating that in terms of slipperiness when used by a shoe sole, what do you find? A. I find it more—based on those tests—it more difficult to slip when there is water on the step, sea water on this step, or oil on this step, or film on this step than a dry step.

Q. It is more difficult to slip? A. That is right.

Q. And was that your finding every time you made the test? A. Yes, sir, with the leather sole.

Q. Do you have here so that you can exhibit the leather shoe sole that you used and the weight and the spring balance? A. Yes.

Q. Will you just hold them up so they can be seen here? A. Yes.

Q. Will you do that please?

The Court: Let's go on, gentlemen, if he has them available, and if anybody wants to see them, all-right.

Cross Examination.

By Mr. Mandell:

Q. Did I understand you to say that you had a weight on a step that was fixed and that you put it on that step?

A. I had a shoe sole which I nailed to a two by six block, about this wide, and about that long, the shoe sole was on the bottom. Then I placed this lead weight on top of the two by six block. The shoe sole was resting on this surface.

Q. The shoe sole was resting on this surface with a fifty-eight pond weight on it? A. Fifty-nine pounds.

Q. Fifty-nine pounds? A. Yes.

Q. There was no movement to it, was there? A. No, it was sitting by.

Q. And the step itself was fastened and stood at one place just like one standing right over here? A. It was fastened to—there's one nail hole there.

Q. Well, it was fastened? A. Yes, it was fastened securely.

Q. That's right.

809 Q. There was no movement to the step itself? A. None whatever.

Q. So the test as you gave it, did not have a condition where the step that you used, this thing that you used, was in constant movement pitching or rolling? A. No.

Q. Did you give it a test which is to simulate the action of a human being—as a walk down in movements, did you? A. No, these were static.

Q. Static conditions, and it is true, is it not, sir, that a moving, as a person who is walking down a step has an entirely different situation, than if I would just stand straight and you would have to pull me off or push me off? A. These conditions are all relative. I merely chose a static position because I could reproduce it more readily and more easily with different surfaces.

Q. I am not criticizing, I just want to understand. That is true, is it not, sir, that the condition was static? A. That's correct.

Q. And a static condition is different than one that you have in movement? A. Yes, sure.

Q. As a person walks down the stairs, there is some slight stopping point, as he is going down the steps, but there is a continuous movement as distinguished 810 from a static position? A. I haven't studied walking down the stairs.

Q. Sir? A. I haven't studied walking down the stairs.

Q. So this test that you gave has not been with the design of seeing what effect it would have on a person as they walk down the stairs? A. No.

Q. Notwithstanding all of these things, did I understand you to say that if you put oil on aluminum such as this, that that will make it less slippery than if you leave it—than if it was completely dry? A. But this here isn't necessarily aluminum.

Q. Well, it has some aluminum on it, doesn't it? A. Yes.

Q. Do I understand then, if you put a film of oil over that area, that it will be less slippery than if it is completely dry? A. On this particular step?

Q. Yes. A. On this step, yes, sir.

Q. Alright, now, you didn't make the test, did you, of taking actual water from the area involved, in the Gulf of Mexico, and mixing it with oil and see what would happen?

A. No, sir.

811 Q. And you are not prepared to tell the Jury what that result might be? A. On the basis of the test that I made, I think I have a good basis for it.

Q. But you made no such test? A. I made no such test, no, sir.

Q. And you do agree, do you not, that when a person walks stairs on a vessel that is pitching and rolling, you have an entirely different situation than if you would place either a person on a static object and try to remove him from that object? A. The co-efficient of friction might be different, but it would be the same.

Q. It would be different but the same? A. Yes.

Q. Thank you, sir.

Re Direct Examination

By Mr. Bolton:

Q. Did you also test a piece of aluminum step such as this? A. I did.

Q. Would you examine that and see if that is a piece of a aluminum step that you used? A. Yes, this is the piece that I used.

812 Q. Now, what was the result of those tests upon that piece of aluminum step?

Mr. Mandell: We object to that. It is not material.

The Court: I sustain the objection.

Q. Mr. Bolton: Alright. Now, then, you told Mr. Mandell that if the test body was in motion the conditions would be different; but the co-efficient of friction would be the same, is that correct? A. The co-efficient of friction would be—you would have to take into consideration the forward motion of that body on this particular surface, and you would consequently get—if you would add that force to

this front force, the co-efficient of friction would be the same, that's correct.

Q. Is it then your answer that if the surfaces tested were the same—for example if the man were moving forward and stepping, that you would still obtain the same co-efficient of friction but the force required would merely be less.

Mr. Mandell: I think that is leading and suggestive, Your Honor.

The Court: I sustain the objection.

Q. Mr. Bolton: Well, explain whether or not you get a different co-efficient of friction if you tested the same sole and in contact with the same surface but in motion? A. Well, we would get essentially the same, if we took into consideration that motion which we would have to transmit in terms of foot-pounds of energy in this direction.

Q. But this friction which is between the objects is the same whether the object is in motion or whether it is static, is that correct? A. That is correct.

Q. And will you get the same relative condition under those test conditions as you got in making your static test? A. Yes, I would, if this step were dry, and then we wet it, that we have described, and then we put the oil film on it, we will get the same relative result.

Q. Is friction a force when measured as you do? A. We express the resistance of an object to move here in terms of force, or in terms of foot-pounds.

Q. Does it take force to overcome that resistance? A. Yes.

Q. And would that force be the same whether the object was in motion or whether the object was static, if the contact was the same with the two surfaces? A. It would take the same total force, yes.

Q. Then do you have an opinion as to whether or not a man with the sole of his foot on the test surface, in moving, would have a less or more slippery condition with the addition of these test substances as you have described? A. Well, I will answer it—I don't think there would be any difference. This remaining static, this is permanent and the surfaces are going to be there irrespective of how the individual places his foot on it, and the same result is to place your foot on it in the same way.

whether it is dry or whether there is an oil film over it, you will get the same relative result. It will take more force, and it will be harder to slip with the oil film on here than it will dry.

Q. You say it will be harder to slip with oil film than it would be dry? A. Yes.

Q. That is all.

Re Cross Examination

By Mr. Mandell:

Q. I am showing you a picture which has been marked Plaintiff's Exhibit No. 9, and you will note the edges over here. The testimony shows these to be aluminum sticking out about an inch or an inch and a half. These appear to be worn, do they not? A. Well, they are certainly smudged, whether it is worn or not, you can't tell. I can't tell from this photograph.

815 Q. Well, if they are worn, then would any slippery substance such as salt water, or plain water or oil and water mixed, would that cause a slippery condition to exist, sticking out from here? A. Well, I didn't make any test on that condition.

Q. I know, but I ask you if you know that. A. It is my opinion that aluminum would be a little more slippery with an oil film on it than this step would.

Q. And if the aluminum, if there were sea water and oil on top of it, that would make it fairly slippery, would it not? A. Oh, I don't think it would be fairly slippery.

Q. Sir? A. I don't think it would be fairly slippery, not if a person put his foot on this step.

Q. Alright.

Re Direct Examination

By Mr. Bolton:

Q. Is this an aluminum surface? A. That's right.

Q. And that is the surface you tested? A. Yes, that's right.

816 Q. Did you make the same test on that surface, and that alone, as you did on these other tests? A. I did.

Q. Did you add the same substances? A. I did.

Q. What effect did you find the addition of oil had upon that with reference to the force necessary to make the object slip? A. I found that it took less force to make an object slip on this step than it did on this step.

Q. But when you added oil to that aluminum step compared to the aluminum step dry, what did you find? A. I found on the dry step, the raised tread required thirty-one pounds to make the pull, and when I added crude oil as I have described, it took thirty-nine pounds.

Q. It took eight pounds more pressure, more pull to make the object slip on that piece of step that you have there with oil on it than it did when you tested it dry? A. That's right.

Q. Now, then, how did your test come out on the same test when you wet it with water and salt water? A. When I wet this oval shape raised tread with sea water, it required thirty-nine pounds to make it pull, which was the same as the oil film.

Q. And the dry test was thirty-one pounds? A. That's right.

817 Q. And did you test that with plain water? A. No, sir, I did not.

Re Cross Examination

By Mr. Mandell:

Q. You didn't test it at any point that was smooth and worn out, did you? A. I tested this step as it is here.

Q. And that is not worn out, it is a new piece of aluminum, is it not? A. It appears to be new.

Q. That is all.

818 HARRY A. BARKLEY, a witness produced by the Defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Bolton:

Q. State your name, please. A. Harry A. Barkley.

Q. Where do you live, sir? A. 1323 Engle, Dallas.

Q. And by whom are you employed? A. Magnolia Petroleum Company.

Q. At what location? A. Field Research Laboratory.

Q. Where is that located? A. It is on the old Duncanville Road, south of Dallas.

Q. How long have you been employed there? A. A little over ten years.

Q. In what capacity have you been in their employ? A. Mechanical Engineer.

Q. Sir? A. Mechanical Engineer.

Q. Mechanical Engineer. Now, Mr. Barkley, I will exhibit to you Defendant's Exhibit No. 2, which is two steps, a full tread and a part tread, and I will ask you if 819 you have seen that before? A. Yes, sir, I have.

Q. On what occasion? A. We were asked to run some tests on these two samples.

Q. When was that? A. In January of this year.

Q. What tests were you asked to run? A. We were to determine the co-efficient of friction of leather and rubber on this step under various conditions.

Q. Did you so determine the co-efficient of friction? A. Yes, sir.

Q. I hand you Defendant's Exhibit No. 30, and ask you to tell me what that represents, what it is? A. This is the method used for determining that co-efficient of friction by actually using a man, supported in a manner so that he could not be hurt, but only when he was actually pulled off the step, the chain caught him so that he would not fall, but that did not support his weight, the safety support did not.

Q. Now, that safety support there—point out what it is. A. It is a chain coming down from the boom and the man, hanging onto it, with a safety belt attached.

Q. Now this H-shaped object at the man's foot, what is that? A. That is a wooden frame that is fixed securely in the ground, and very level, it is leveled up on the 820 ground there, on which these two pieces were mounted, set.

Q. Were they mounted in much the same way as they are mounted here? A. That's right.

Q. And what does this depict here, these lines from the man's right foot where it is gone there out to where it says "pull"? A. That is a rope forming a swing about

his foot down low on the shoe, and another man was pulling this and another observing, who had nothing else to do except to watch the weight indicated or the fourth indicated here and the foot slipped.

Q. Is this thing sealed, measured in terms of pounds?
A. That's right.

Q. And was this test devised by you? A. That's right.

Q. Did you test the sole of that man's foot in contact—do you know what the approximate weight of the man was?

A. 172 pounds.

Q. 172 pounds? A. That's right.

Q. And what type shoe did he have on? A. A standard Oxford shoe with a leather sole.

Q. Leather sole? A. And rubber heel.

821 Q. Did you place them in the position with all of his weight on the foot, the shoe that was to be tested?
A. That's right, on the sole.

Q. And did you pull him off the step? A. Not always clear off, but it was caught the minute it started to slide.

Q. And did you measure the amount of pounds necessary to do that each time? A. That's right.

Q. And when you did that; under what condition did you have the step in when you did that? A. First it was dry, then it had salt water on it.

Q. And then what else? A. And then salt water and oil mixture.

Q. Allright. Now, then, with reference to the pull necessary to move that man testing the sole of the shoe, with his weight on the sole, pulled in that manner, did you reach a conclusion as to whether that surface or these two surfaces each one separately, were affected by the addition of these test substances? A. They were.

Q. State what difference in force, or did it take more pull to make him slip in that position with his sole there when salt water had been added to the step or did it take less? A. It took less than it did when it was dry.
822 Q. It took what? A. I mean more pull.

Q. It took more pull. A. That's right, more pull when the step had salt water on it than when it was dry.

Q. Than it did when it was dry? A. Yes.

Q. Now, then, did it take more or less pull when you added your mixture of oil and water? A. It took more than it did when it was dry.

Q. It took more than it did when it was dry. What that true likewise of this small segment here? A. That's right.

Q. How much water did you use on the step before making these tests? A. It was saturated at each time.

Q. How did you mix the water and oil? A. The water and oil was just mixed right on the step.

Q. You added your oil and then water or water and then oil? A. That's right.

Q. On these steps? A. That's right.

Q. And did you each time, find that you—that the addition of each of those substances would require more
823 force to pull the shoe? A. That's right.

Q. That's all.

MOTION TO STRIKE THE EVIDENCE AND DENIAL THEREOF

Mr. Mandell: If it please the Court, we move to strike the evidence for the reason that the same condition did not exist and therefore it is irrelevant and immaterial and prejudicial.

The Court: Objection overruled.

Mr. Mandell: Note our exception.

Cross Examination

By Mr. Mandell:

Q. I believe it's shown in that drawing that you made, that thing was fixed, was it not? A. Yes, that's right.

Q. And it was fixed in the ground? A. Yes.

Mr. Bolton: Will you answer out, so that we can all hear you, please?

Q. Mr. Mandell: You didn't make a test in a situation where a man would be on a boat such as the one we are having here, the J. C. Stephens, and the boat was pitching and rolling? A. No, sir.

824 Q. And you say you did mix some oil with sea water or with some water, which? A. With some salt water.

Q. Salt water, you just took some salt and added the water, is that it? A. Yes.

Q. Do you know what the consistency of the water is around the Gulf of Mexico and inland? A. Not exactly, no, sir.

Q. You don't know what other minerals you have in that water, do you? A. No.

Q. And regardless of that, you are telling the Jury that putting oil on a step such as the one here that we have, will make it more difficult for a person to slip on it than when it is dry? A. It proves that they put more force and that therefore the coefficient is higher. That is all we proved.

Q. Well, just tell me in my own plain language, is it less likely for me or anyone else like me to slip if there was oil on the step like that than without oil? Can you answer that question? A. According to our figures, yes, it is less likely that you will slip.

Q. Do you have any aluminum steps around the place where you work? A. No, sir.

Q. Steps such as these? A. No, sir.

Q. From your experience down here would you recommend that oil be put on steps like these in order to stop people from slipping? A. No, I wouldn't.

Q. That would be dangerous, would it not? A. It is a fire hazard too.

Q. And it is dangerous also besides fire hazard? A. It is not necessarily dangerous.

Q. I think that's all.

OFFERS IN EVIDENCE

Mr. Bolton: We offer in evidence the Exhibits which have been marked Defendant's Exhibits 9, 10, 11, 12, 8, 6, 16, 17.

Mr. Mandell: No objection.

Mr. Bolton: I would like also to offer pictures numbered Defendant's Exhibits 31 and 31A and B and C and so forth.

Mr. Mandell: No objection.

Mr. Bolton: We offer Defendant's Exhibit No. 30.

Mr. Mandell: No objection.

826 The Court: Let the record show that Defendant's Exhibit 18A, if it hasn't already been offered in evi-

dence, is offered in evidence at this time, being the piece of aluminum.

Mr. Bolton: I would also like to offer the caption page of the deposition of Bert Ashton to show his deposition was taken in this case.

Mr. Mandell: If he is introducing the deposition, I have no objection to it.

The Court: Let the record show that motion has been made to exclude the testimony of the witness, Riess, Defendant's witness, regarding tests which he made upon the windows of the J. C. Stephens, with water from a hose. The Plaintiff's Motion is granted, and gentlemen of the jury, you will not consider for any purpose the testimony of the witness, Riess, who testified regarding water tests made on the windows of the J. C. Stephens using a hose and water from the dock.

Mr. Bolton: To which ruling, the Defendant excepts.

The Court: Alright.

Mr. Bolton: Defendant rests.

842 MRS. RICHARD A. McALLISTER, a witness produced by the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Mandell:

Q. You are Mrs. Richard A. McAllister? A. Yes, sir.

Mr. Bolton: I object to the testimony from this witness unless it is relevant.

The Court: What is the nature of the testimony?

Mr. Mandell: It is on the question of the pain the Plaintiff suffered, and the type of work he did.

The Court: I overrule the objection.

Mr. Bolton: Note our exception.

Q. Mr. Mandell: Mrs. McAllister, you are Mr. McAllister's wife? A. Yes, sir.

Q. Speak out loud, will you, please, mam? A. Yes, sir.

Q. Do you remember after your husband came home, and I supposed you learned that he was hurt on the job? A. Yes, sir.

Q. Do you remember when he went back to work after that? A. Yes.

843 The Court: You will have to speak out, please, ma'am.

Q. Mr. Mandell: Do you remember when he went back to work after that? A. Yes.

Q. I am not asking you about the date, but he did go back to work after that? A. Yes.

Q. When he came home from work, what would he do? A. Well, he usually went to bed.

Q. What would you have to do for him after he would go to bed? A. Massage his back and rub his legs to make him relax.

Q. Was he able to sleep well at night after that? A. No.

Q. What would happen to him during the night? A. Well, he just couldn't seem to get comfortable and his legs would bother him, and his back would bother him.

Q. Did he ever suffer such kind of pain before? A. No, sir.

Q. Do you remember the occasion that Mr. Rosson had to bring Mack home from work? A. Well, he came home several times with Mr. Rosson.

Q. Do you remember when Mr. Rosson had to carry him, help your husband into the house from the car?

844 Mr. Bolton: I object to that because it is not rebuttal.

Mr. Mandell: Alright, I will withdraw it.

The Court: Sustain the objection.

Q. Mr. Mandell: As long as you were married to your husband until that time that he got hurt, did he ever have any difficulty going about his duties or at home or at work so far as you know? A. Before he got hurt?

Q. Yes, ma'am. A. No, sir, he was alright.

Q. After Mack was laid off, at the Magnolia Petroleum Company, do you remember when he worked at this cemetery? A. Yes, I do.

Q. What did he do when he got home? A. He just rested, he couldn't hardly get in the house until he went right to bed.

Q. What would you do for him? A. Massage his legs and massage his back.

Q. And so far as you were able to see, has Mack been able to do any kind of work around the house since he was hurt? A. No, very little. He gets tired quick, his back hurts him and he has to lie down.

845 RICHARD A. McALLISTER, the Plaintiff, being recalled, testified as follows:

Re Direct Examination

By Mr. Mandell:

Q. Mr. McAllister, who besides you was present when you slipped and fell? A. Mr. Ashton was right behind me.

Q. And besides you made an examination of the steps to see what was on it? A. Mr. Ashton and I.

Mr. Bolton: We object to this as repetition; he testified about it on direct examination.

The Court: I sustain the objection.

Q. Mr. Mandell: Mr. McAllister, you have heard the testimony of Captain Rosson? A. Yes.

Q. Do you recall that the gasket around the large window, over the steps, the port window, has been changed after you fell? A. Not the large window. I, myself assisted in changing the gaskets on—around those small windows, the Yard carpenter and I.

Q. Who is that? A. Mr. Smith.

846 Q. Was that after you fell? A. Yes, sir.

Q. Now, then, did you ever see Captain Rosson do anything about those windows? A. No, sir, not that I can recall.

Q. Did Captain Rosson ever go home with you? A. Yes, sir, we drove home with one another.

Q. And after you got hurt, was there any occasion that Captain Rosson would have to do something for you when you got out of the car?

Mr. Bolton: If the Court please, I object to this not being rebuttal testimony. There is certainly no testimony about that in the record until now.

The Court: Objection sustained.

Q. Mr. Mandell: You heard the testimony of Mr. Vandever and the other gentleman who followed him. As you stepped on that first step and as you began to slip, what did you feel under your foot? A. Well, it wasn't exactly that I would say that I felt anything under my foot. When I stepped on that ladder, my foot never did stop. As I stepped on it—

Mr. Bolton: Your Honor; I object to this because it is repetition.

The Court: Objection overruled.

Mr. Bolton: Note our exception.

847 A. As I stepped on that step, it was just a continuous motion. My foot never did stop, it just slid on off the step.

Q. Mr. Mandell: Did you feel it sliding, slick? A. Yes, sir.

Q. Well, that's what I mean.⁹ Did you feel something slick right under your foot? A. Yes.

Q. And it was thereafter that you found the oil on there? A. Yes.

Q. You have had experience, practical experience with oil on metal, haven't you? A. Yes, sir.

Q. And do you know what the effect is of oil on metal, any kind of metal? A. Well, I can say from my own experience in that engineroom in particular, that during overhauls those passageways between the two engines and the deck around would get covered with oil, laying parts on them that we had taken off the engine in unwrapping parts and washing parts, and I know from being there, that oil on that aluminum does make it slick, and if it was dry and my shoes were dry, I didn't slip.

Q. Mr. McAllister, you heard the testimony that there were some holes drilled in that drip pan, do you know whether there were any holes in that drip pan before 848 you fell and got hurt? Q. Not to my knowledge there wasn't, sir.

Cross Examination

By Mr. Bolton:

Q. In the engineroom when you say you know about the effect of oil on those steps, that's a different kind of step in the first place than the one we have had here, is it not, different tread? A. I am not talking about the steps. I am talking about—when I was referring to how slick it was, I was talking about this aluminum plate that you had there.

Q. This plate? A. Yes, sir.

Q. Such as this? A. Yes.

Q. That is what you have down in the engineroom on the walkway? plate. A. Yes, sir.

Q. And when this happened to you down in the engine-room, you say the plate was completely covered with grease or that there was a lot of it there? A. There was oil, grease, water, Diesel fuel that we had used to wash 849 parts with.

Q. Alright, you had been down there working when these things happened, you don't go down there to make a test of it, did you, it was while you were working, something you observed then, is that right? A. Well, now, just what do you mean by a test?

Q. Well, you didn't ever sit down and make a test just to see if this would happen, did you? A. No, sir, I didn't.

Q. So what you are testifying about is an experience that you had? A. That is right, sir.

Q. And that followed a time when you had been working on your engine? A. That is right.

Q. And you had on your work clothes? A. Yes, sir.

Q. And your work shoes? A. Yes, sir.

Q. And so you may have very well had oil on your shoes, is that right? A. In all probability, I did.

Q. And so what you are talking about, is a test of oiled shoes and oiled surface on aluminum, that is where 850 there is oil on both surfaces? A. Yes.

Q. Isn't that what you are talking about? A. Yes, sir.

Re Direct Examination

By Mr. Mandell:

Q. Did you ever have occasion to see what effect it would have on a dry shoe, when you step on an aluminum plate like this with oil on it? A. I have come aboard that boat when even after I left the employment of the Magnolia and there was repair work going on in the engine-room, they were replacing some lines at that time. I was in Morgan City; I knew all of those boys, they were old friends of mine, and I went down to talk to them. And in going down through between the engine, it was very slick and I had on my dress shoes.

Q. Now, did you ever, before you got hurt, not on the day you got hurt, but other than the day that you got hurt,

have occasion to visit these drilling barges? A. Will you say that again, sir?

Q. Did you have occasion to visit those drilling barges? A. While I was working, sir?

Q. Yes. A. Yes, sir, on many occasions.

851 Q. Did you ever see the men who work on those drilling barges with their work clothes on in the galley eating? A. Well, not so much as eating as they would come down for coffee. I knew most all of those men. We generally kept the refrigerator locked.

Q. I am talking about on the dredge itself, I mean on the barge itself. Do you understand what I am saying, Mr. McAllister? Does the barge itself have a galley? A. Yes.

Q. Did you observe the men who worked on the barge go to the galley on the barge with their work clothes on? A. Yes, sir.

Q. Did you observe them tracking down mud and oil and stuff like that into their own galley? A. Whatever might be in their mud rooms, and there was oil and water in all this mixture, whatever was in there would come into the galley; yes, sir.

Q. Have you ever seen men who were ready to get off with their dress clothes on, go back on the barge and come back and bring oil on there? A. Yes, sir, all of those men are not relieved at one time, and the men, they are all acquainted with one another, and talking with one another back and forth, they will show each other things that they have started and have completed, one will be dressed and ready to go, and the other will be ready to go to work. The time from one crew over to the other, for one instance, take the mechanics for instance—

852 Q. Well, did they walk in there even though they are dressed, walked into the place where there is mud and oil in there? A. Yes.

Q. Then come on your boat? A. Yes, sir.

Re Cross Examination

By Mr. Bolton:

Q. Now, on this occasion that you went back to Morgan City and went down where the engine repair was on, you say you found it slippery down there? A. Yes, sir.

Q. Did you examine your shoes before you got on there?
 A. No, sir, I didn't.

Q. So you don't know, just before the time that you found it slippery, whether you had already gotten some oil on your shoes or hadn't gotten oil on your shoes, do you?

A. I wouldn't think it would have been.

Q. You don't know; do you? A. No, sir, I didn't give them no examination.

853 Q. So you could very well there again have been slipping with oil surface on your shoes against oil surface on this aluminum tread? A. I wouldn't say it would have been impossible.

Q. Alright, that is all.

Mr. Mandell: Your Honor, they say they will produce the witness, Ashton, and we want to see him.

Mr. Bolton: Bring him in. We object to him saying our witness, Ashton. He is not our witness.

Mr. Mandell: Your Honor, we object to that statement.

The Court: Gentlemen, you will not consider the comments of counsel. You will consider only the testimony which you hear on this witness stand.

854 B. V. ASHTON, a witness placed on the stand by the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Mandell:

Q. You are Mr. B. V. Ashton? A. Yes, sir.

Q. You are the man who worked as a deckhand while Mr. McAllister was an engineer there? A. Yes, sir.

Q. You are the same man whose deposition I have taken in the offices of the Magnolia Petroleum Company on the 13th day of September, 1954, when Mr. Bolton and some other Company officials were there and I? A. Yes, sir.

Q. At that time I showed you a statement that you had given, didn't I? A. Yes, sir.

Q. I asked you whether the facts in there were true, didn't I? A. Yes, sir.

Q. And you said they were? A. Yes, sir.

855 Q. Is that right? A. Yes, I said that.

Q. And at that time I asked you if you looked to see upon the stairs or looked at the place from which Mr. McAllister fell, to see whether there was oil and you said that you put your hand on it and found oil there, do you remember? A. Yes, sir.

Q. And you swore to tell the truth, didn't you? A. Yes, sir.

Q. And that was true, wasn't it? A. No.

Q. Sir? A. No, sir.

Q. It wasn't true? A. No, sir.

Q. You said it was true on the 13th day of September, didn't you? A. Well, sir—

Q. I asked you. You said it was true, on the 13th day of September, didn't you? A. When I said there—when that statement was signed by me on that day, I didn't know anything about where that statement come nor who had written that statement, but now, if you want me to tell you the truth, I'll tell you the truth.

856 Q. I asked you at that time to tell me the truth, didn't I? A. Yes.

Q. And you raised your hand and swore to tell the truth, didn't you? A. Yes.

Q. And before you signed that statement, you went before a Notary Public in Morgan City, Louisiana, didn't you? A. Yes, sir.

Q. And he asked you if it was the truth, didn't he? A. Yes.

Q. And you said it was, didn't you? A. Yes, I did at that time.

Q. And on September the 13th, 1953, when I asked you whether it was the truth, you told me it was? A. Yes.

Q. Right there before Mr. Bolton—asked you if it wasn't the truth and you told me it was? A. Yes, sir.

The Court: Speak up.

A. Yes, sir.

Q. Mr. Mandell: The Magnolia Petroleum Company brought you down here and you have been here since Monday, haven't you? A. Yes, sir.

857 Q. Mr. Bolton: If the Court please, I object to any further questions trying to impeach his own witness.

The Court: Objection sustained.

858 DEFENDANT'S BILL OF EXCEPTION

Outside the presence of the Jury, the witness, George Rosson, was recall to the stand and testified as follows for the purpose of the Bill of Exception and not in the presence of the Jury.

Examination

By Mr. Bolton:

Q. Mr. Rosson, were you present in Morgan City, Louisiana, during the fall of 1954, at which time a water hose was played against the three port windows of the J. C. Stephens? A. I was.

Q. How was the Stephens moored at that time or docked? A. She was in the Magnolia Slip with the port side toward the dock.

Q. Allright, now. A. The way I remember.

Q. Now, on that occasion, did you observe the condition of each one of the windows, these three windows on the port side of the vessel? A. Yes, I did.

Q. And had you been on the vessel during October of 1950? A. Yes, sir.

Q. How was the condition of each of those windows in October, 1950, compared to the condition of each of those windows on the date of the hose test, if you know? A. I think the windows were in at least good condition at that time as they were in 1950.

Q. You think that the windows were in at least as good a condition? A. Yes.

Q. Was there any substantial difference in the condition that you know of? A. Not that I know of.

Q. Now, then, describe if you will, what was done with the hose on that occasion. A. Well, we had a regular garden hose hooked up to the hydrant, fresh water hydrant in the Slip, and I figured approximately twenty-five to thirty pounds of pressure which was directed on these windows, and as I remember it, we found a little seepage on this square window over the landing, in the after upper corner of that window.

Q. For approximately how long was hose played against that window? A. I would say approximately forty to forty-five minutes.

Q. Was it just that window or all of the windows? A. I

don't remember too much about the galley windows at the time. I imagine we put it on all of the windows, but we were, I was in fact primarily interested in that square window at the time.

860. Q. And did the seepage develop at more than one point on the window? A. No, in the top rear corner of the window.

Q. After it became apparent that seepage was there, was the hose or not continued to be played against that point? A. Yes, the hose was held at that point.

Q. For approximately how long? A. I wouldn't know exactly, but I would say at least five minutes. I was outside holding the hose at one time, and I think that we let the deckhand hold the hose and I went inside to see how much water we got.

Q. And after that test against the window, did you observe whether or not any water had seeped through the window, and in sufficient quantities to have gotten on the top step of the ladder? A. No, all the water that got in, it seeped in where the gasket—where the glass meets the frame, where the gasket and that glass fits in itself, and there was a little seepage there that ran down the glass and dripped on the flat surface just below the window frame and ran off down right by the side of the bulkhead on the deck, just about enough water to make the water mark on the bulkhead.

Q. And none of that water anytime ever got upon the top step of the ladder, is that right? A. No, not during that test.

861. Q. I believe you say you do not remember the effect of the test upon the other two windows? A. That's correct.

MR. BOLTON: BE IT REMEMBERED that the above offered testimony was offered in evidence from the witness, George Rosson, and upon objection of Counsel, for Plaintiff, Richard McAllister, was by the Court excluded, to which offer and action of the Court, the Defendant, Magnolia Petroleum then and there duly excepted and noted such exception.

Examination

By Mr. Mandell:

Q: You were not on the boat at the time you later learned that Mr. McAllister fell on the step and hurt himself, were you? A. I was working on the boat, but I was not aboard at the time.

Q. You were not aboard? A. At the time Mr. McAllister had his accident, no, I was not aboard.

Q. You were off that entire week? A. I think he got hurt on the first or second day of his work week, and if that is so, I had gotten off a day or two days before that.

862 Q. Do you remember what kind of weather you had the week before Mr. McAllister got hurt? or a day or two before he got hurt? A. Yes, as I remember, we had some pretty rough weather.

Q. Do you remember now, which way the wind and seas were coming from? A. I couldn't say for sure, but I am pretty sure we had southerly winds.

Q. Well, if you can't say, you can't say. A. Because there was a big disturbance usually from the—.

Q. (Interrupting). Well, you just don't remember, you are just saying what sometimes happened? A. Yes.

Q. Well, do you remember how long before Mr. McAllister was hurt that you all changed the dogs? A. No, I can't remember how long before the last dog or the first dog was changed. They were changed at intervals whenever they needed to be changed.

Q. And do you know how many times work was done on these gaskets and windows on the port side of the Stephens over the stairs leading to and from the galley from the time Mr. McAllister was hurt until the test was made? A. No, I don't know anything about these windows over the galley, how many times. I understand they were worked on, but as far as this square window, to my knowledge, the only time it was ever worked on, was the 863 Spring of 1953, I believe it was.

Q. Don't you know in the year before 1953, the gasket in the large window was changed? A. No, I don't know that.

Q. It might have been changed and you don't know it? A. That is possible.

Q. A lot of work might have been done on that window and you don't know, when you were off the boat? A. If there were any major repairs made to the boat, I think I would have known about it.

Q. I didn't ask you that. I asked you that a lot of work might have been done on that window at a time when you were off the boat? A. If it was a lot of work, it would be a major repair, and I think I would know about it, and it would undoubtedly be entered in the Log.

Q. Did you always enter that in the Log? A. Any major repairs.

Q. When you fixed these windows? A. When I was aboard, I am pretty sure that any major repair made on those windows was in the Log.

Q. There was no reference in the Log to any work on the windows? A. There is some on the Log when I was 864 on board at the time.

Q. It is not on the Log of that boat down here, or did you see it? A. I have seen it. I haven't looked all through it.

Q. That's all.

(End of Bill of Exception.)

The Court: Let the record show that before all parties announced their respective cases closed that the Defendant offered in evidence certain records of the Marine Hospital, that the Court ruled the records contained on official stationery of the Marine Hospital were admissible in evidence over the objection of the Plaintiff, that the Court ruled that the matter contained in the records on letterheads and memoranda, not on official stationery or official printed forms, would not be admitted in evidence. The Plaintiff excepted to the ruling of the Court. Anything else, gentlemen, to go into the record?

Mr. Mandell: If it please Your Honor, there is a Stipulation that the Magnolia Petroleum Company was written a letter by our office stating that we represented Mr. McAllister on August 19th, 1953, and that it was received by them on August 26th, 1953.

865 Mr. Bolton: May it be stipulated that the case was filed in August 1953.

Mr. Mandell: Whatever the record shows.

The Court: You may get the petition. It is stipulated that the suit was instituted as of the date the Original Petition was filed, whatever the record shows.

OFFERS IN EVIDENCE

Mr. Bolton: Defendant now offers in evidence as DEFENDANT'S EXHIBIT No. 35, six pages of Documents, Department of Health Education & Welfare, Public Health Service, Medical Officer in charge of the U. S. Public Health Service Hospital at New Orleans, Louisiana.

Mr. Bolton: Defendant next offers in evidence as DEFENDANT'S EXHIBIT No. 36, 24 pages of Documents from Medical Officer in charge of the U. S. Public Health Service Hospital at Galveston, Texas, in connection with the hospital stay of Richard A. McAllister.

The Court: Let the record show that the Defendant's Exhibit 25 and Defendant's Exhibit 36 were admitted into evidence over the objection of the Plaintiff.

STIPULATION

Mr. Mandell: It has been stipulated that whatever time the jury may find in response to the maintenance issue, and which under the law, plaintiff may be entitled to, that that may be computed at the rate of \$6.00 per day, and that Mr. Bolton and I have agreed that such time as he has been in the Marine Hospital or employed, will be deducted by the Court from such number of days for the time that the jury may find that the Plaintiff was entitled to maintenance, is that correct, Mr. Bolton?

Mr. Bolton: Yes. I am not sure whether the legal effect of the earnings is by day or by month.

Mr. Mandell: I think you will find it is by day.

Mr. Bolton: You are not asking me to stipulate what the law is, are you?

Mr. Mandell: Oh, no. Of course not.

And both Plaintiff and Defendant rested.

875:

Defendant's Exhibit 32

(Being captain only off deposition of Burke v. Ashton in the pending cause showing same was taken at Morgan City, La. on the 13th day of September 1954 before Frank Conklin, a notary public in and for Harris County, Texas.)

876

IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS
134TH JUDICIAL DISTRICT

(Title Omitted)

Plaintiff's Trial Amendment—Filed March 11, 1955

To THE HONORABLE JUDGE OF SAID COURT:

Now COMES PLAINTIFF RICHARD McALLISTER and, with leave of Court first had and obtained, files this his Trial Agreement, alleging as follows:

I.

Plaintiff would show this Honorable Court that in his cause of action he seeks to enforce a federal right in that Congress passed legislation providing for the enforcement of such right within three years from the date which gave rise to plaintiff's cause of action, and Congress having set the time within which to file such claim to be three years from the date of the occurrence thereof, the Court must apply the limitation statute in causes of action such as these by the three year Federal Statute rather than the two year statute of the State of Texas.

II.

Plaintiff would further show that under the law he is entitled to join in his cause of action under the Jones Act, an allegation for recovery under the admiralty doctrine of unseaworthiness; that under such circumstances the period of limitation within which to bring such action is governed by the three year period provided for under the Federal Statutes.

III.

Plaintiff would further show your Honorable Court in reply to defendant's plea of laches that plaintiff was employed by the defendant from the date of his injuries to August 19, 1953, that during such time plaintiff sought to

Judge's Approval to Statement of Facts

The foregoing transcript of testimony and agreement of Counsel, having been presented to the Court for approval, the same is hereand now approved and ordered filed, together with Volume 2 containing the Exhibits introduced in the case, as the Statement of Facts in this cause.

CHAS. E. LANG, JR.

Judge, 134th District Court

869

Defendant's Exhibit I

1100 ARR Q. Boat

1105 Dept Q Boat

1315 ARR Blk 120

1930 Dept. " "

1530 Turned around by Tool Pusher

Barge Broke Loose Don't

Need Drilling Crew

1730 ARR Q Boat Standing by

Wednesday Oct. 18, 1950

Standing by Q Boat.

1030 Departed Mag Inn—9 passengers

1430 Arrived Block 87

1500 Departed Block 87—3 passengers

1830 Arrived Mag Inn

Thursday October 19, 1950

0400 Departed Mag. Inn

0500 Arrived Barge No. 6 at No. 7 Beacon

0515 Departed Barge No. 6—7 passengers

0830 Arrived Mag Slip

1630 Departed Mag. Slip—9 passengers

1835 Arrived Mag. Inn

R. A. McAllister滑 on wet ladder steps leading from lounge to galley, twisted back and left shoulder, F. B. Dressel.

Friday October 20, 1950

0730 Departed Mag. Inn

0945 Arrived Block 125

1015 Departed Block 125

11170 Arrived Barge No. 5 at No. 7 Beacon

1200 Departed Barge No. 5

1310 Arrived Mag Inn

STEPHENS
RECORD

RECORD

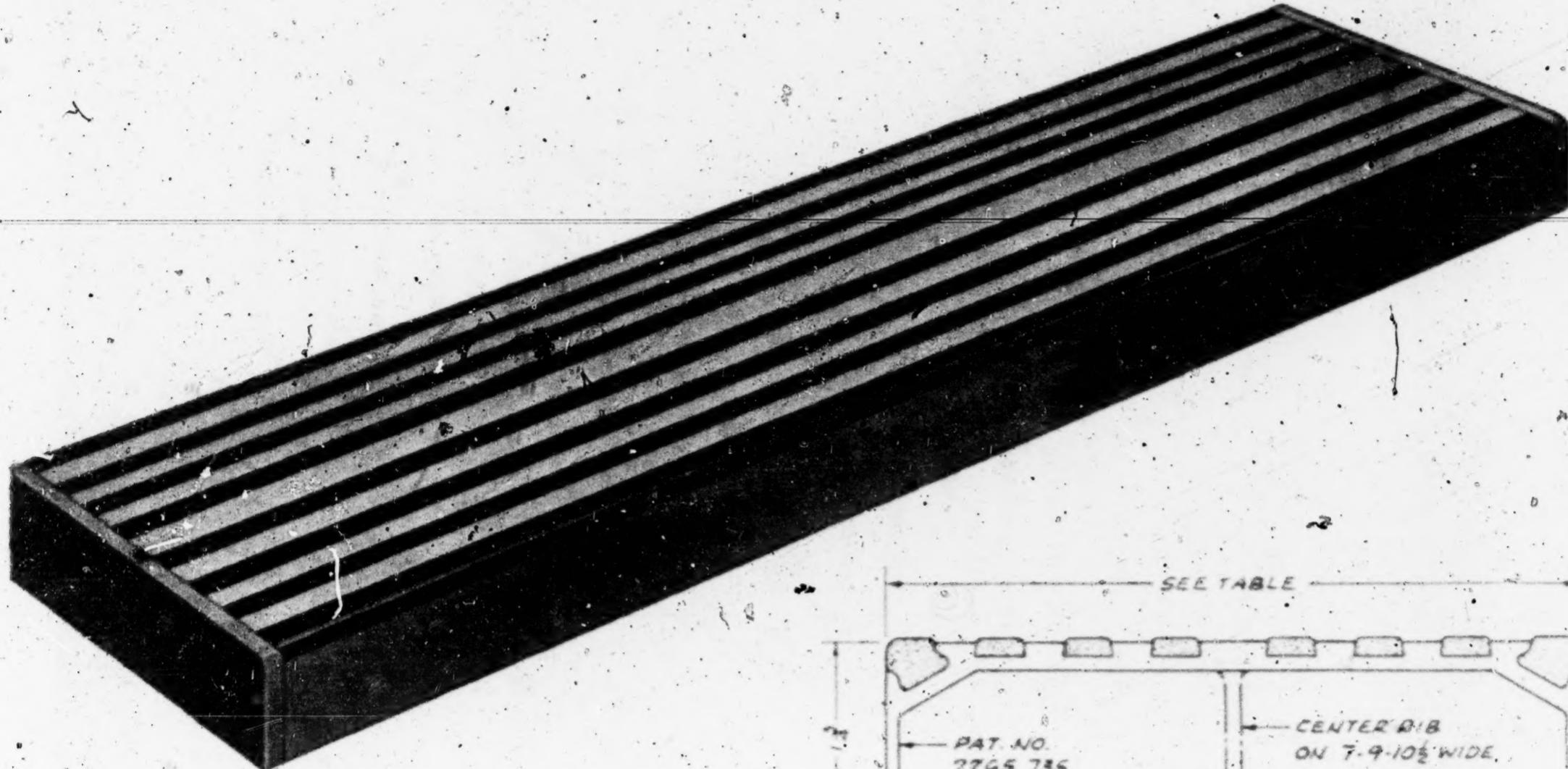
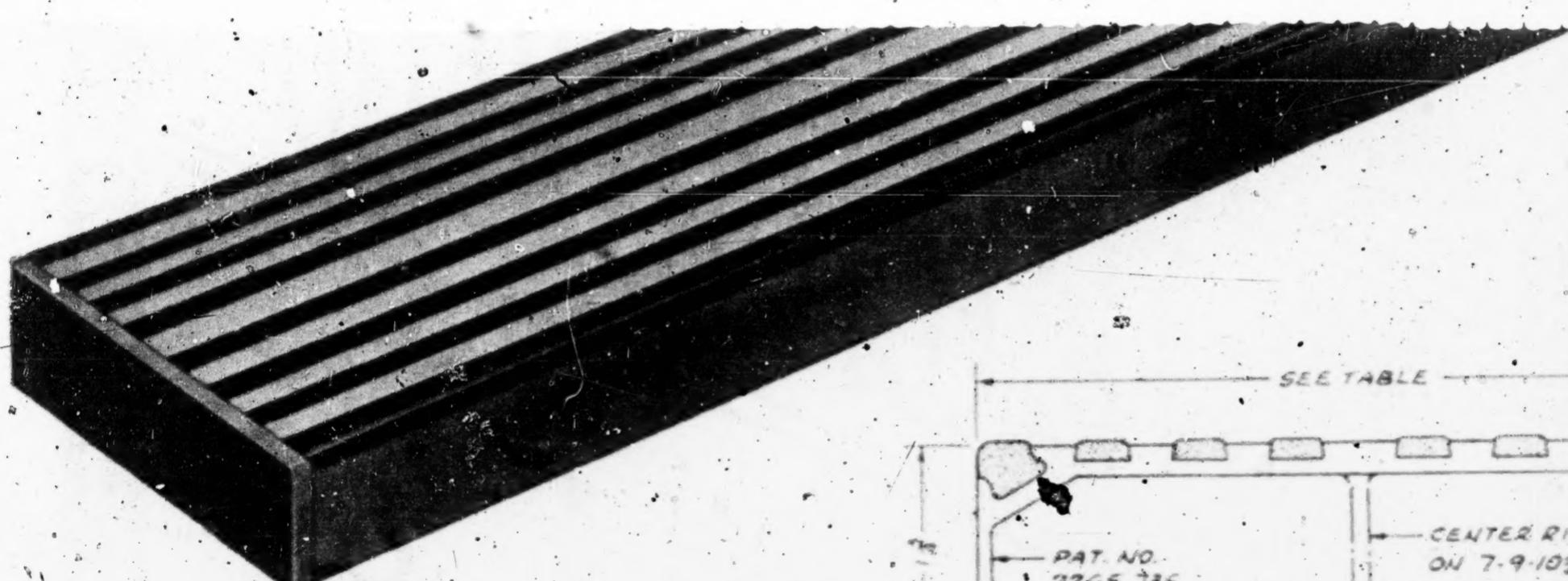
(348)

TREADS LADDER and SAFETY or DECK

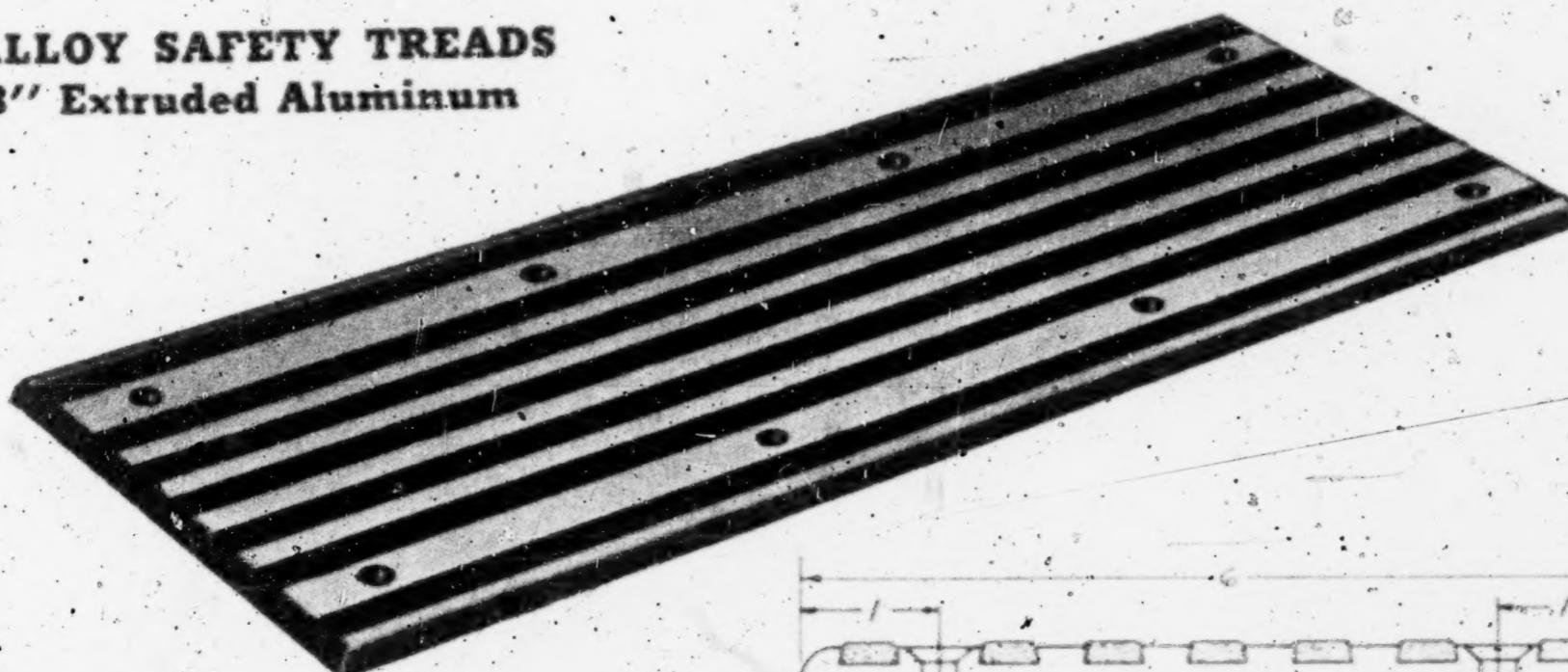
EXTRUDED ALUMINUM LADDER TREADS—TYPE C

All treads are made of aluminum alloy, having the grooves filled with Heintz proprietary abrasive mixture consisting of 24 grain aluminum oxide and other ingredients, bonded with synthetic resin

Size Inches	Wt. Lbs.										
15 x 4 $\frac{1}{2}$	3.15	18 x 4 $\frac{1}{2}$	3.69	21 x 4 $\frac{1}{2}$	4.24	24 x 4 $\frac{1}{2}$	4.77	27 x 4 $\frac{1}{4}$	5.32	30 x 4 $\frac{1}{2}$	5.85
15 x 6	3.96	18 x 6	4.55	21 x 6	5.43	24 x 6	6.00	27 x 6	6.62	30 x 6	7.21
15 x 7 $\frac{1}{2}$	5.2	18 x 7 $\frac{1}{2}$	6.1	21 x 7 $\frac{1}{2}$	7.00	24 x 7 $\frac{1}{2}$	7.77	27 x 7 $\frac{1}{2}$	8.75	30 x 7 $\frac{1}{2}$	9.66
15 x 9	6.15	18 x 9	7.83	21 x 9	8.1	24 x 9	9.00	27 x 9	10.1	30 x 9	10.98
15 x 10 $\frac{1}{2}$	6.8	18 x 10 $\frac{1}{2}$	7.94	21 x 10 $\frac{1}{2}$	9.26	24 x 10 $\frac{1}{2}$	10.1	27 x 10 $\frac{1}{2}$	11.4	30 x 10 $\frac{1}{2}$	12.54

**ALUMINUM ALLOY SAFETY TREADS**
ALUMINUM ALLOY SAFETY TREADS
Flat Type "B" Extruded Aluminum

Size Inches	Wt. Lbs.
18 x 6	3.10
24 x 6	4.00


HEINTZ MANUFACTURING COMPANY
FRONT STREET and OLNEY AVENUE

PHILADELPHIA, PENNA.

871

obtain medical care and attention from the defendant; that plaintiff did not know that he could not continue in the defendant's employ nor obtain medical care and at-
877 tention for his impaired physical condition until after August 19, 1953, when he learned that he would need medical care and attention including operations which the defendant failed and refused to supply to him, and that he could not continue in defendant's employment and could not obtain such medical care and attention at the United States Public Health Service facilities..

IV.

Plaintiff would further show that no prejudice came to the defendant since it appears without dispute in the evidence that all of the witnesses who were present on the M/V J. C. STEPHENS on October 19, 1950, and all of the employees of the defendant connected with the operation and the maintenance of the M/V J. C. STEPHENS are still in the employ of the said defendant, and available to it for any and all testimony that the defendant may see fit to produce, and which it did produce during the trial of this case; therefore, plaintiff would show that he had good cause for failure to file said claim and suit prior to the date that he did so, and that no prejudice occurred nor has resulted to the defendant by plaintiff's filing his suit at the time he did.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays for recovery of damages as prayed for in his first amended petition.

MANDELL & WRIGHT

By /s/ ARTHUR J. MANDELL
Attorneys for Plaintiff

(File Endorsement Omitted)

873

Defendant's Exhibit 22
(p. 250-Plane)

1620 Departed Mag. Inn
1800 Entered Bayou Shaffer
1875 Left Bayou Shaffer & arrived Mag. Slip.

Saturday October 21, 1950

1200 Departed Mag. Slip—16 passengers
1620 Arrived Block 95
1740 Departed Block 95—17 passengers
2130 Entered Bayou Shaffer
2215 Left Bayou Shaffer & Arrived Mag. Slip

Sunday October 22 1950

Standing by, general cleaning and painting

Monday October 23 1950

1000 Departed Mag. Slip—20 passengers
1015 Boarded by Coast Guard, everything okay
1540 Arrived Block 87
1730 Departed Block 87—17 passengers
2230 Entered Bayou Shaffer
2320 Left Bayou Shaffer & Arrived Mag. Slip

Tuesday October 24, 1950

0900 Departed Mag. Slip—18 passengers
1320 Arrived Block 120
1330 Departed Block 120—8 passengers
1540 Arrived Block 87
1555 Departed Block 87—One passenger
1755 Arrived Block 120
1800 Departed Block 120—Two passengers
1810 Arrived Block 125
1815 Departed Block 125
2200 Entered Bayou Shaffer
2250 Left Bayou Shaffer & arrived Mag. Slip

878 IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS.
134TH JUDICIAL DISTRICT

(Title Omitted)

Charge and Verdict—Filed March 11, 1955

GENTLEMEN OF THE JURY:

This case is submitted to you on special issues—that is, you are called on to answer some questions as to particular facts in the case, from the evidence you have heard in the trial. You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony, but in matters of law, you must be governed by the instructions in the charge. In discharging your responsibility on this jury, please remember that there are standards of conduct to be lived up to, and rules to be obeyed; and that if you do not comply with them, our efforts will be wasted.

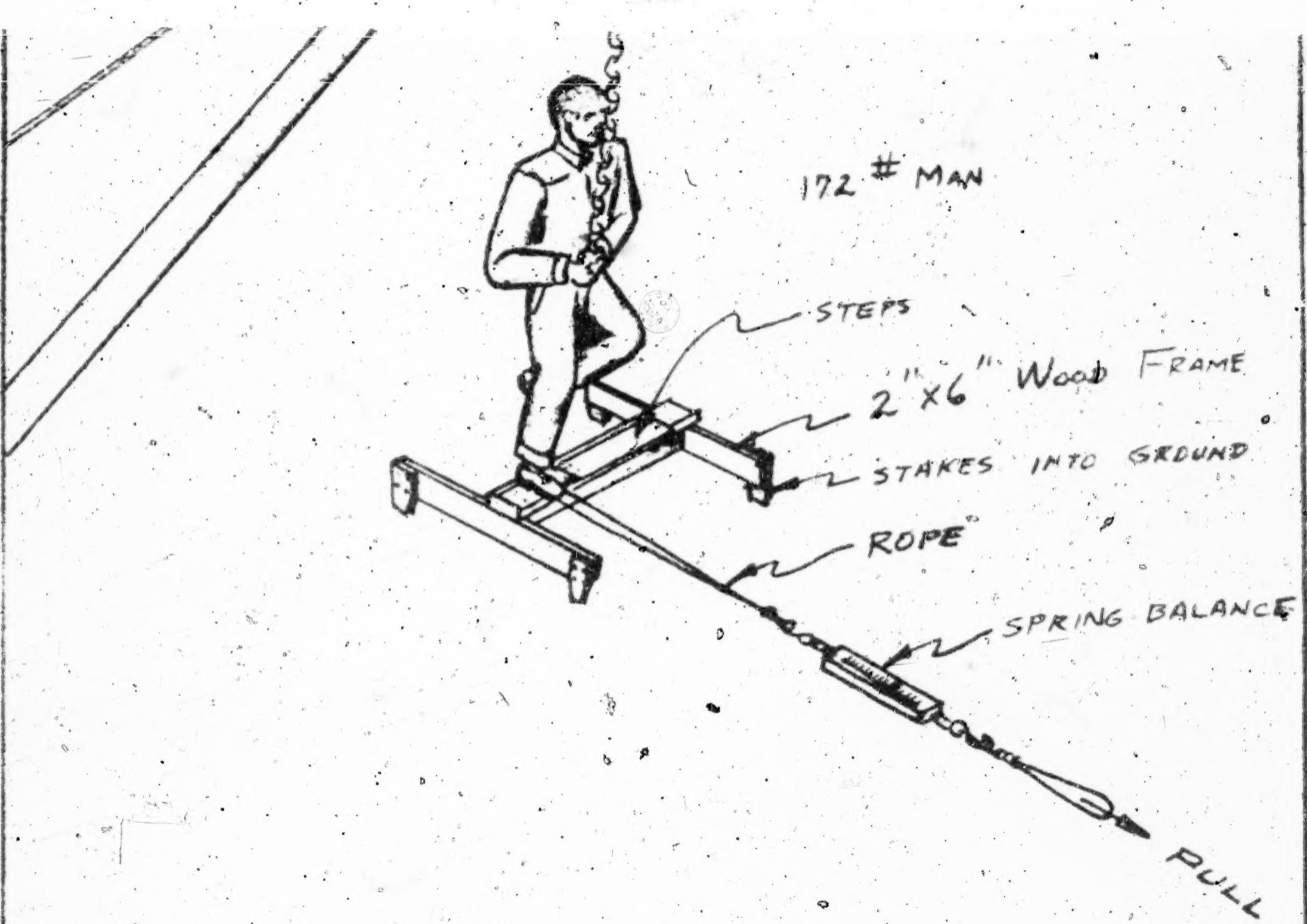
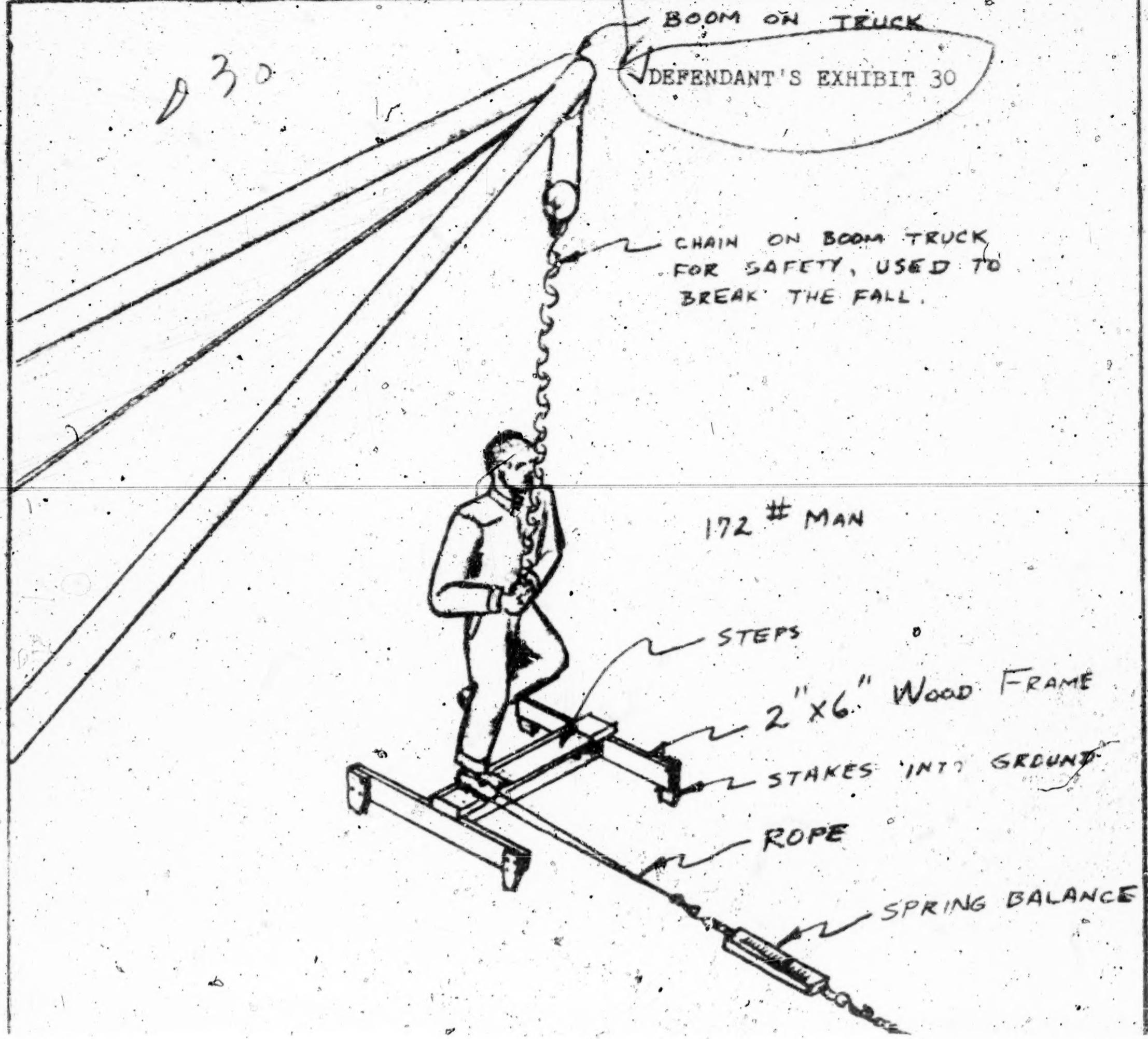
1. Do not let bias, prejudice, sympathy, resentment, or any such emotion play any part in your deliberations.

2. During the time of your deliberations do not discuss the case, or even mention it to anyone whomsoever, nor permit it to be mentioned in your hearing, except in the jury room when all jurors are present for the purpose of deliberating on the verdict.

3. Do not speculate on matters not shown by the evidence, and about which you are not asked any questions. Remember that you cannot guess your way to a just and correct verdict.

4. Be very careful not to consider or mention any personal knowledge or information you may have about any fact or person, which is not shown by the evidence you have heard in this trial. Do not try to gather any evidence for yourselves. Your duty is to answer these
879 questions from the evidence you have heard here, and from that alone.

5. Do not try to reach a verdict by lot, or chance, and do not return a quotient verdict, by adding together figures, dividing by the number of jurors, and agreeing to be bound by the result. Do not do any trading on your answers—that is, some of you agreeing to answer certain questions one way if others will agree to answer other questions another way. All questions must be answered by a unanimous vote and not by a majority vote.



EXPERIMENTAL SETUP USED IN DETERMINING THE
COEFFICIENT OF FRICTION BETWEEN SHOES & STEPS

J

874

6. Do not decide who you think should win, and then try to answer the questions accordingly. If you do that, your verdict will be worthless, and all of your time will have been wasted. Simply answer the questions as you find the facts from the evidence, without concerning yourselves about the effect of your answers.

7. Keep these rules in mind at all times, and obey them strictly, until you have returned your verdict. The verdict will consist of your answers to the questions, written in the blanks provided, with the certificate signed by your foreman on the last page of the charge.

"Preponderance of the evidence," as that term is used in this charge, means the greater weight and degree of credible testimony before you.

"Negligence", as that term is used in this charge, means a failure to exercise ordinary care.

"Ordinary care, as that term is used in this charge means that degree of care which would be exercised by a person of ordinary prudence, under the same or similar circumstances.

"Proximate cause", as that term is used in this charge, means that cause which in its natural and continuous sequence, unbroken by any new and independent

880 cause, produces a result that would not have occurred but for such cause, and which said result, or some like result, ought reasonably to have been foreseen or anticipated in the light of the attending circumstances.

There may be more than one proximate cause of an event.

"Natural and continuous sequence", as that term is used in this charge, means the usual and ordinary succession of events.

Bearing in mind the foregoing definitions and instructions, you will answer the following special issues:

SPECIAL ISSUE No. 1

Do you find from a preponderance of the evidence that on or about October 19, 1950, plaintiff Richard A. McAlister received an injury to his body while attempting to walk down the stairs leading from the lounge to the galley of the M/V J. C. STEVENS?

Answer "Yes" or "No".

ANSWER: Yes.

SPECIAL ISSUE No. 2

Do you find from a preponderance of the evidence that, at the time and on the occasion in question, the portholes or windows over and near the galley stair leading to and from the lounge of the crew ship in question were not in a watertight condition:

Answer "they were not" or "They were."

ANSWER: They were not.

If you have answered the preceding special issue "They were not", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 3

Do you find from a preponderance of the evidence that the portholes or windows in question not being in a 881 watertight condition, if you have so found in answer to special issue No. 2, made the crew ship in question "unseaworthy", as defined herein?

You are instructed that the term "unseaworthy", as used herein, means that a vessel with its appliances and fittings is not reasonably fit for the purposes for which it is being used.

Answer "Yes" or "No". ANSWER: No.

If you have answered the preceding special issue "Yes", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 4

Do you find from a preponderance of the evidence that the unseaworthy condition, if any you have found in answer to the preceding special issue, of the crew ship in question, was a proximate cause of the injuries, if any, sustained by the plaintiff McAllister at the time and on the occasion in question?

Answer "Yes" or "No". ANSWER:

If you have answered special issue No. 2 "They were not", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 5

Do you find from a preponderance of the evidence that, at the time and on the occasion in question, the failure of

the defendant, its officers, agents and employees to keep in a watertight condition the portholes or windows over and near the steps leading to and from the galley and lounge of the crew ship in question, was negligence, as defined herein?

Answer "Yes" or "No".

ANSWER: No.

If you have answered the preceding special issue 882 "Yes", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 6

Do you find from a preponderance of the evidence that such negligence, if any you have found in answer to the preceding special issue, was a proximate cause of the injuries, if any, sustaines by plaintiff McAllister at the time and on the occasion in question?

Answer "Yes" or "No".

ANSWER:

SPECIAL ISSUE No. 7

Do you find from a preponderance of the evidence that, at the time and on the occasion in question, the defendant, its officers, agents and employees failed to keep in "proper repair" the portholes, or windows and their gaskets and attachments located over and near the lounge stairs leading to and from the galley of the crew ship in question?

You are instructed that the term "proper repair", as used herein, means that state of repair or condition which an ordinary prudent person in the exercise of ordinary care would have maintained the portholes or windows and gaskets and attachments under the same or similar circumstances.

If your answer is in the affirmative, let the form of your answer be "It did fail"; otherwise, let the form of your answer be "No".

ANSWER: No.

If you have answered the preceding special issue "it did fail", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 8

Do you find from a preponderance of the evidence
 883 that such failure, if any you have found in answer
 to the preceding special issue, was a proximate cause
 of the injuries, if any, sustained by plaintiff McAllister at
 the time and on the occasion in question?

Answer "Yes" or "no".

ANSWER:

Do you find from a preponderance of the evidence that,
 at the time and on the occasion in question, the top step
 of the galley stairs leading to and from the lounge on the
 M/V J. C. Stephens was coated with oil?

Answer "Yes" or "No". ANSWER:

If you have answered the preceding special issue "Yes",
 then you will answer the following special issue; otherwise,
 you need not answer it.

SPECIAL ISSUE No. 10

Do you find from a preponderance of the evidence that
 the top step of the galley-lounge stairs in question was
 coated with oil, if you have so found, for such a period of
 time that the defendant's officers, agents or employees
 should have discovered and removed it?

Answer "It was" or "It was not". ANSWER:

If you have answered the preceding special issue "it
 was", then you will answer the following special issue;
 otherwise, you need not answer it.

SPECIAL ISSUE No. 11

Do you find from a preponderance of the evidence that
 the defendant's officers, agents or employees act in permitting
 the oil coating, if any, on the top step of the galley-
 lounge stairs was negligence, as defined herein?

Answer "Yes" or "no". ANSWER:

If you have answered the preceding special issue "Yes",
 then you will answer the following special issue;
 884 otherwise, you need not answer it.

SPECIAL ISSUE No. 12

Do you find from a preponderance of the evidence that
 such negligence, if any you have found in answer to the
 preceding special issue, was a proximate cause of the in-

juries, if any, sustained by plaintiff McAllister at the time and on the occasion in question?

Answer "Yes" or "No". ANSWER:

SPECIAL ISSUE No. 13

Do you find from a preponderance of the evidence that, at the time and on the occasion in question, the deck above the M/V J. C. Stephens galley was not watertight?

Let the form of your answer be "It was Not"; or "If was."

ANSWER: It was not.

If you have answered the preceding special issue "It was not", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 14

Do you find from a preponderance of the evidence that the deck above the galley not being watertight, if you have so found in answer to special issue No. 13, made the crew ship in question "unseaworthy", as defined herein?

You are instructed that the term "unseaworthy", as used herein, means that a vessel with its appliances and fittings is not reasonably fit for the purposes for which it is being used.

Answer "Yes" or "No".

ANSWER: No.

If you have answered the preceding special issue "Yes", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 15

Do you find from a preponderance of the evidence that the unseaworthy condition, if any you have found in the preceding special issue, of the crew ship in question was a proximate cause of the injuries, if any, sustained by the plaintiff McAllister at the time and on the occasion in question?

Answer "Yes" or "No".

ANSWER:

If you have answered special issue No. 13 "It was not", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 16

Do you find from a preponderance of the evidence that, at the time and on the occasion in question, the failure of the defendant, its officers, agents and employees to have the deck watertight above the M/V J. C. Stephens galley was negligence, as defined herein?

Answer "Yes" or "no".

ANSWER: No.

If you have answered the preceding special issue "Yes", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 17

Do you find from a preponderance of the evidence that such negligence, if any you have found in answer to the preceding special issue, was a proximate cause of the injuries, if any, sustained by plaintiff McAllister at the time and on the occasion in question?

Answer "Yes" or "No".

ANSWER:

SPECIAL ISSUE No. 18

886. Do you find from a preponderance of the evidence that, at the time and on the occasion in question the plaintiff McAllister attempted to descend the stairs in question without using the overhead grab iron?

Answer "Yes" or "No". ANSWER: Yes.

If you have answered the preceding special issue "Yes", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 19

Do you find from a preponderance of the evidence that the plaintiff's attempt to descend the stairs without using the overhead grab iron, if you have so found in answer to the preceding special issue, was negligence, as defined herein?

Answer "Yes" or "No". ANSWER: No.

If you have answered the preceding special issue "Yes", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 20

Do you find from a preponderance of the evidence that such negligence, if any you have found in answer to the preceding special issue, was a proximate cause of the injuries, if any, sustained by plaintiff McAllister at the time and on the occasion in question?

Answer "Yes" or "No". ANSWER: _____.

SPECIAL ISSUE No. 21

Do you find from a preponderance of the evidence that the plaintiff McAllister, at the time and on the occasion in question, attempted to descend the ladder without facing the steps thereof?

Answer "Yes" or "No". ANSWER: Yes.

If you have answered the preceding special issue "Yes", then you will answer the following special issue; otherwise, you need not answer it.

887

SPECIAL ISSUE No. 22

Do you find from a preponderance of the evidence that plaintiff's attempt to descend the ladder without facing the steps thereof, if you have so found in answer to the preceding special issue, was negligence, as defined herein?

Answer "Yes" or "No". ANSWER: No.

If you have answered the preceding special issue "Yes", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 23

Do you find from a preponderance of the evidence that such negligence, if any you have found in answer to the preceding special issue, was a proximate cause of the injuries, if any, sustained by the plaintiff McAllister at the time and on the occasion in question?

Answer "Yes" or "No". ANSWER: _____.

SPECIAL ISSUE No. 24

Do you find from a preponderance of the evidence that, at the time and on the occasion in question, the plaintiff McAllister attempted to descend the stairs without making proper use of the handrail at the side of the stairs?

You are instructed that the words "proper use", means

such us as a person of ordinary prudence in the exercise of ordinary care would have made under the same or similar circumstances.

Answer "Yes" or "No". ANSWER: No.

If you have answered the preceding special issue "Yes", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 25

Do you find from a preponderance of the evidence
888 that plaintiff McAllister's attempt to descend the stairs without making proper use of the handrail, if you have so found in answer to the preceding special issue, was a proximate cause of the injuries, if any, sustained by McAllister at the time and on the occasion in question?

Answer "Yes" or "No". ANSWER:

SPECIAL ISSUE No. 26

Do you find from a preponderance of the evidence that the soles of plaintiff McAllister's shoes had become wet with water before he attempted to descend the galley steps on the occasion in question?

Answer "Yes" or "No". ANSWER: Yes.

If you have answered the preceding special issue "Yes", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 27

Do you find from a preponderance of the evidence that plaintiff McAllister's attempt to descend the galley stairs while the soles of his shoes were wet with water, if you have so found in answer to the preceding special issue, was negligence, as defined herein?

Answer "Yes" or "no". ANSWER: No.

If you have answered the preceding special issue "Yes", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 28

Do you find from a preponderance of the evidence that such negligence, if any you have found in answer to the preceding special issue, was a proximate cause of the in-

juries, if any, sustained by plaintiff McAllister at the time and on the occasion in question?

Answer "Yes" or "No". ANSWER:

SPECIAL ISSUE No. 29

889. Do you find from a preponderance of the evidence that, at the time and on the occasion in question, the failure of the plaintiff McAllister to remove the water from the steps on the ladder before undertaking to descend the steps was negligence, as defined herein?

Answer "Yes" or "No". ANSWER: No.

If you have answered the preceding special issue "Yes", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 30

Do you find from a preponderance of the evidence that such negligence, if any you have found in answer to the preceding special issue, was a proximate cause of the injuries, if any, sustained by plaintiff McAllister at the time and on the occasion in question?

Answer "Yes" or "No". ANSWER:

Do you find from a preponderance of the evidence that the injuries, if any, sustained by plaintiff McAllister, at the time and on the occasion in question, were not the result of an unavoidable accident?

Let the term of your answer be "They were not the result of an unavoidable accident."

In connection with the foregoing special issue you are instructed that the term "unavoidable accident" means an event occurring without the negligence of plaintiff McAllister or the defendant Magnolia Petroleum Company, its officers, agents or *employes*.

ANSWER: They were the result of an unavoidable accident.

If you have answered special issues Nos. 20, 23, 25, 28 & 30 "yes", or if you have answered "yes" to any of them, and only in such event, then answer the following special issue.

890

SPECIAL ISSUE No. 32

From a preponderance of the evidence, what proportion do you find that the negligence, if any, on the part of the

plaintiff Richard McAllister, bore to the combined negligence, if any you have found, of the plaintiff and defendant?

Answer by stating the per cent.

ANSWER:

SPECIAL ISSUE No. 33

From a preponderance of the evidence on what date, if any, do you find that plaintiff Richard McAllister has reached, or will reach his maximum physical recovery beyond which his condition could not be improved by the ordinary treatment known to medical science?

Answer by giving the date, if any.

You are instructed that by the term "ordinary treatment known to medical science" is meant such medical care, attention, surgery, and home treatments as in reasonable probability was or will be expected to be of some benefit to Richard McAllister, beyond which his condition could not be improved by such ordinary treatment known to medical science.

Answer—Sept. 11, 1956

SPECIAL ISSUE No. 34

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence will reasonably and fairly compensate Richard McAllister for his loss of earnings in the past, if you find there has been any in the past, and for his diminished capacity to labor and earn money in the future, if you find there will reasonably and probably be any in the future, and for his physical pain and mental suffering in the past, if you find there has been any in the past, and in the future, if you find there will reasonably and probably be any in the future, and for his reasonable and necessary doctors and hospital bills in the past, if you find there have been any in the past, and in the future, if you find there will reasonably and probably be any in the future, directly and proximately resulting from the fall, if any, of the plaintiff McAllister on the occasion in question?

Answer in dollars, if any, and cents, if any.

ANSWER: \$32,500.00.

You are the sole judges of the facts of the credibility of the witnesses and of the weight and credit to be given to

the testimony, but the law you are bound to receive from the Court as it is given you herein, and be governed thereby.

You are further instructed that while you are deliberating upon your answers to the special issues that have been submitted to you, you will not mention nor refer to, nor take into consideration any matter, fact or circumstance, other than the testimony that has been admitted before you, all of which I instruct you particularly to observe and obey.

After argument of counsel you will retire to the jury room, select your own foreman and write your answers to the special issues in the blank space left after each special issue for that purpose.

Your foreman will sign the form of verdict as it is shown below.

/s/ CHAS. E. LONG, Jr.
Judge.

Verdict:

We, the Jury, have answered the foregoing special issues as indicated above and herewith return the same into court as our verdict in this case.

892

/s/ JAMES H. BROWN
Foreman.

(File Endorsement Omitted)

893 IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS

134TH JUDICIAL DISTRICT

(Title Omitted)

Plaintiff's Requested Instruction No. 1—Filed March 11, 1955

If you have answered Special Issue No. 9 "Yes" then you will answer the following special Issue; otherwise you need not answer it.

SPECIAL ISSUE No. 10

Do you find from a preponderance of the evidence that the coating of oil on the top step of galley-lounge stairs in question, if you have so found, was tracked on such step by employers of the defendant other than plaintiff.

Answer It was or it was not.

The above and foregoing requested instruction was by the plaintiff submitted to opposing counsel for examination, as required by law, and was specially requested by defendant in the manner required by law, before the court's main charge was read to the jury, and was separately and collectively considered by the court and was separately and collectively refused by the court, to which action defendant in open court excepted.

/s/ CHAS. E. LONG, JR.
Judge Presiding

(File Endorsement Omitted)

894 Plaintiff's Special Issue No. —Filed March 11, 1955

From a preponderance of the evidence what do you find to be the reasonable cost of medical care and attention including doctors, hospitals, nurses bills and medicines that plaintiff has incurred from and after October 19, 1950, to the date of trial, and such future medical bills as may be incurred in the future and beyond the date of trial.

Answer by stating the amount in dollars and cents.

Refused.—/s/ CHAS. E. LONG, JR.

895 Plaintiff's Requested Issue—Filed March 11, 1955

"You are instructed that by return"

"Unseaworthy", as used herein, is meant that the portholes and its fittings were not reasonably fit for the purpose for which such portholes are used.

Refused—/s/ CHAS. E. LONG, JR.

896 IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS

134TH JUDICIAL DISTRICT

(Title Omitted)

**Plaintiff's Objections and Exceptions to the Court's Charge—Filed
March 11, 1955**

Now COMES RICHARD McALLISTER, plaintiff herein, and files this his objections and exceptions to the Court's charge after the evidence had closed and before the Court's charge had been read to the jury, and for such objections and exceptions plaintiff would respectfully show as follows:

I.

Plaintiff objects and excepts to the manner in which Special Issue No. 2 was submitted in that this Special Issue No. 2 inquired of the jury whether defendant "failed" to have and keep in watertight condition the portholes or windows inquired about in said special issue, because said Special Issue, as drawn, is incorporated by reference with the issue dealing with unseaworthiness. The Word "failed" indicates a negligent failure to do something constituting an omission or commission, which is not a proper standard based on unseaworthiness which is a species of liability without fault. Therefore, the issue as submitted is erroneously drawn and the issue should not be submitted. At which time the Court said "I will change that", wherefore Plaintiff withdrew his objection and exception to Issue No. 2.

II.

Plaintiff objects and excepts to the submission of Special Issue No. 3 wherein the Court inquires of the jury whether the portholes or windows in question not being in a watertight condition, as inquired about in Special Issue No. 2 made the crew ship "unseaworthy" as defined herein, because such Special Issue No. 3 submits to the jury a question of law and not of fact. The question of what constitutes "unseaworthy" is whether or not the portholes or windows were not watertight. If the jury should find that the portholes inquired about in Special Issue No. 2 were not in a watertight condition, then the jury has in effect found such portholes or windows to be un-

seaworthy. Therefore, Special Issue No. 3, as submitted, is improper and prejudicial for the reasons hereinabove stated. And, Plaintiff respectfully submits to the Court that the issue immediately following Special Issue No. 2 should be a proximate cause issue and not Special Issue No. 3 as the Court submitted. Plaintiff here and now requests the Court to submit Special Issue No. 3, as follows:

If you have answered the preceding special issue "They were not", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 3

Do you find from a preponderance of the evidence that the portholes or windows over and near the galley stairs leading to and from the lounge of the crew ship in question, not being in a watertight condition, if you have so found, was a proximate cause of the injuries, if any, sustained by the plaintiff Richard McAllister at the time and on the occasion in question.

Answer "Yes", or "No".

III.

Plaintiff further objects and excepts to the submission of Special Issue No. 3 because said Special Issue No. 3 as worded places a greater burden upon plaintiff than the one provided for by law.

IV.

Plaintiff further objects and excepts to the Court's definition submitted to the jury in connection with 898 Special Issue No. 3 and states that such definition is improper, highly prejudicial and confusing, because such definition leads the jury to believe that before they can find unseaworthiness under the facts in this case they must find the vessel *as a whole* unseaworthy rather than the three portholes or windows, as inquired about in Special Issue No. 2, unseaworthy, which is an improper application of the law to the facts in the case and places a greater burden upon plaintiff than required by law, and in fact places an impossible burden upon plaintiff not being contemplated by law; and plaintiff here and now respectfully requests the Court that if the Court submits Special Issue No. 3 inquiring of the jury whether the portholes or windows

not being in a watertight condition made the crew ship "unseaworthy", plaintiff still objecting to the submission of said issue, nevertheless respectfully moves the Court to submit the following definition of "unseaworthy":

You are instructed that by the term "unseaworthy, as used herein, is meant that the portholes or windows over and near the galley stairs leading to and from the lounge of the crew ship in question were not reasonably fit for the purpose for which said portholes or windows were used.

V.

Plaintiff objects and excepts to the submission of Special Issue No. 11, conditioned as it is on Special Issue No. 10. Said Special Issue No. 10 inquiring of the jury whether the top step of the stairs leading to and from the galley was coated with oil; said Special Issue No. 11 inquiring whether the failure of the Defendant's officers, agents and employees to "remove" the oil, grease or other slippery substance from such stairs was negligence because

899 in a case such as this wherein the evidence is undisputed that at the time and on the occasion in question only employees of the defendant were on that vessel or came aboard said vessel and therefore if oil was on said stairs, by necessity it had to be placed or somehow gotten on that step by employees of the defendant herein; since under the old Maritime Law as drafted into and combined with the Law under Section 688, Title 46, U.S.C.A., the fellow-servant doctrine is not a defense, The finding under the circumstances in this case that there was oil on the steps, there is no burden upon the plaintiff to show that the failure of the defendant to remove it was negligence, the inquiry ought to be in Special Issue No. 11 as follows: Do you find from a preponderance of the evidence that the presence of oil, grease, or other slippery substance on the top step of the stairs leading to and from the galley of the J. C. STEPHENS at the time and on the occasion in question was negligence, and whether such negligence was proximate cause. Such issue places a greater burden upon the plaintiff than the one required by law; for the same reason and with the Court and Counsel for the defendant's permission, we will incorporate the same objection to Special Issue No. 12, because Special Issue No. 12 is predicated on Special Issue No. 11.

VI.

Plaintiff objects and excepts to the submission of Special Issue No. 14 wherein the Court inquires of the jury whether the deck above the galley not being in a watertight condition as inquired about in Special Issue No. 13 made the crew ship "unseaworthy" as defined herein, because such Special Issue No. 14 submits to the jury a question of law and not of fact. The question of what constitutes "unseaworthy" is whether or not the deck above the galley was or was not watertight. If the jury should find that the deck above the galley as inquired about in Special Issue No. 13 was not in a watertight condition, then the jury has in effect found such deck to be unseaworthy. Therefore, Special Issue No. 14, as submitted, is improper and prejudicial for the reasons hereinabove stated. And, Plaintiff respectfully submits to the Court that the issue immediately following Special Issue No. 13 should be a proximate cause issue and not Special Issue No. 14 as the Court submitted. Plaintiff here and now requests the Court to submit Special Issue No. 14 as follows:

If you have answered the preceding Special Issue "It was not", then you will answer the following special issue; otherwise, you need not answer it:

SPECIAL ISSUE No. 14

Do you find from a preponderance of the evidence that the deck above the galley not being watertight, if you have so found, was a proximate cause of the injuries, if any, sustained by the plaintiff Richard McAllister at the time and on the occasion in question.

Answer "Yes", or "No."

VII.

Plaintiff further objects and excepts to the submission of Special Issue No. 14 because said Special Issue No. 14, as worded, places a greater burden upon plaintiff than the one provided for by law.

VIII.

Plaintiff further objects and excepts to the Court's definition submitted to the jury in connection with Special

Issue No. 14, and states that such definition is improper, highly prejudicial and confusing; because such definition leads the jury to believe that before they can find unseaworthiness under the facts in this case they must find the vessel as a whole unseaworthy rather than the deck above

the galley as inquired about in Special Issue No. 13, 901 which is an improper application of the law to the

facts in the case and places a greater burden upon plaintiff than required by law; and in fact places an impossible burden upon plaintiff not being contemplated by law, and plaintiff here and now respectfully requests the Court that if the Court submits Special Issue No. 14 inquiring of the jury whether the deck above the galley not being in a watertight condition made the crew ship "unseaworthy", plaintiff still objecting to the submission of said issue, nevertheless respectfully moves the Court to submit the following definition of "unseaworthy":

You are instructed that by the term "unseaworthy" as used herein, is meant that the deck above the galley of the crew ship in question was not reasonably fit for the purpose for which said deck was used.

IX.

Plaintiff objects and excepts to the submission of Special Issue No. 18, inquiring of the jury whether the plaintiff McAllister attempted to descent the stairs in question without using the grab iron on the ceiling or overhead, for the following reasons:

1. The position of the grab iron was neither on the ceiling nor overhead, but was on a beam running athwart ship approximately about six feet away from the top step, and therefore such issue does not conform with the evidence.

2. That said issue does in effect fail to submit a controverted fact issue to the jury. Plaintiff has testified unequivocably that he did not use the grab iron on the beam forward of the top stair.

3. All the witnesses testified that the position of the grab iron was such that it could not be reached from the top step; that it was not designed to be reached or held

onto while plaintiff or any other person similarly 902 situated would or could get hold of that grab iron from the top step, but on the contrary, all of the evidence is that the grab iron is designed to be used after

he had descended the second, third or fourth step. For that reason the submission of such issue to the jury is improper, is not supported by the evidence and that there is insufficient evidence to warrant a submission of such Issue to the jury.

X.

Plaintiff objects and excepts to the submission of Special Issue No. 19 to the jury because the same is irrelevant and immaterial in view of the Court's error in submitting Special Issue No. 18 and since Special Issue No. 18, as hereinabove objected to, is not supported by any evidence, or insufficient evident to warrant the Court's submission thereof to the jury.

XI.

Plaintiff objects and excepts to the submission of Special Issue No. 20 to the jury because the same is irrelevant and immaterial in view of the Court's error in submitting Special Issue No. 18 since Special Issue No. 18, as hereinabove objected to, is not supported by any evidence, or insufficient evidence to warrant the Court's submission thereof to the jury.

XII.

Plaintiff objects and excepts to the submission of Special Issue No. 21, because the evidence is undisputed as to all of the witnesses, expert and non-expert witnesses, produced by the defendant as well as the plaintiff, that those stairs were so designed that persons using the same by walking down from the lounge to the galley would be facing forward, i.e., facing into the galley rather than backward, as Special Issue No. 21 inquires of the jury. That the defendant's witnesses, Captain Dressel, testified that he does not know or remember how he used those stairs,

903 Rhodes, Rosson and all other witnesses testified that the design of such steps, the position of a hand rail and grab iron were such that they were made to be used pushing forward and looking at the stairs, and not in the manner inquired about in Special Issue No. 21, and therefore said Issue is irrelevant, immaterial, presents no fair question to the jury and is highly prejudicial.

XIII.

Plaintiff objects and excepts to the submission of Special Issue No. 22 to the jury because the same is irrelevant and immaterial in view of the Court's error in submitting Special issue No. 21 since Special Issue No. 21, as hereinabove objected to, is not supported by any evidence, or insufficient evidence to warrant the Court's submission thereof to the jury.

XIV.

Plaintiff objects and excepts to the submission of Special Issue No. 23 to the jury because the same is irrelevant and immaterial in view of the Court's error in submitting Special Issue No. 21, as hereinabove objected to, is not supported by any evidence, or insufficient evidence to warrant the Court's submission thereof to the jury.

XV.

Plaintiff objects and excepts to Special Issue No. 24 inquiring of the jury whether the plaintiff in attempting to descend the stairs without making proper use of the hand rail at the side of the stairs, because there is no evidence to support any such issue. The evidence of the plaintiff showing that he has used the same method in going down these stairs as any other witness who was brought forward in the trial of this case. Therefore such issue has no support in the evidence, or there is insufficient evidence as to make such issue without finding any support in the 904 evidence, and with the Court's permission we would like to make the same objection to Special Issue No. 25, insofar as it affects Special Issue No. 24.

XVI.

Plaintiff objects and excepts to Special Issue No. 25 to the jury because the same is irrelevant and immaterial in view of the Court's error in submitting Special issue No. 24 since Special Issue No. 24, as hereinabove objected to, is not supported by any evidence, or insufficient evidence to warrant the Court's submission thereof to the jury.

XVII.

The Plaintiff objects and excepts to Special Issue No. 26, because there is no evidence to support the submission of such Issue to the jury, or, in the alternative that the evidence is wholly insufficient to support the submission of such Issue No. 26 to the jury, the evidence being undisputed that McAllister had wiped his shoes before stepping over the coaming leading to the platform and/or the steps.

XVIII.

Plaintiff objects and excepts to the submission of Special Issue No. 27 to the jury because the same is irrelevant and immaterial in view of the Courts error in submitting Special Issue No. 26 since Special Issue No. 26, as hereinabove objected to, is not supported by any evidence, or insufficient evidence to warrant the Court's submission thereof to the jury.

XIX.

Plaintiff objects and excepts to the submission of Special Issue No. 28 to the jury because the same is irrelevant and immaterial in view of the Court's error in submitting Special Issue No. 26, since Special Issue No. 26 as hereinabove objected to is not supported by any evidence, or insufficient evidence to warrant the Court's submission thereof to the jury,

905

XX.

Plaintiff objects and excepts to Special Issue No. 29, because there is no evidence to support the submission of such Issue to the jury; or in the alternative that the evidence is wholly insufficient to support the submission of such issue No. 29 to the jury, the evidence being undisputed that at the time and on the occasion in question, the vessel had just completed a run from Beacon No. 7 to the Barge, which was east of said Beacon No. 7, and the wind and sea water were beating against the port holes over and above said stairs and that thereafter, after leaving the said Barge, which was east of Beacon No. 7 and headed toward Morgan City, the vessel was heading into the northeast wind, and therefore the evidence is undisputed that it was impossible to wipe off such water, because immediately

other water would be coming in, therefore placing an undue burden upon the plaintiff.

XXI.

Plaintiff objects and excepts to the submission of Special Issue No. 30 to the jury because the same is irrelevant and immaterial in view of the Court's error in submitting Special Issue Number 29 since Special Issue No. 29, as hereinabove objected to, is not supported by any evidence, or insufficient evidence to warrant the Court's submission thereof to the jury.

XXII.

Plaintiff objects and excepts to the submission of Special Issue No. 31, inquiring whether the injuries suffered by Mr. McAllister, the Plaintiff, was the result of an unavoidable accident because there is no evidence, or in the alternative there is insufficient evidence to support the submission of such issue to the Jury.

XXIII.

Plaintiff objects and excepts to the submission of Special Issue No. 32, because such issue, predicated as 906 it is upon Special Issues Numbers 20, 23, 25, 28 and 30, which in turn have been improperly submitted and plaintiff reiterates his objections to the various numbered issues hereinabove set out insofar as said Special Issue No. 32 relates to such issues.

XXIV.

Plaintiff objects and excepts to the Court's failure to submit plaintiff's requested Instruction No. 1 wherein plaintiff requested Special Issue No. 10 conditioned on No. 9 as given by the Court inquiring of the jury as follows:

"Do you find from a preponderance of the evidence that a coating of oil was on the top step of the galley-lounge stairs, was tracked on such step by employees of the defendant other than the plaintiff?

Answer "It was" or "It was not".
Then,

If you have answered the preceding Special Issue "It was", then you will answer the following special issue; otherwise you need not answer it.

Do you find from a preponderance of the evidence that the tracking of such oil by employees other than plaintiff, if you have so found, was negligence?

And,

If you have answered the preceding Special Issue "It was," then you will answer the following special issue; otherwise you need not answer it.

Do you find from a preponderance of the evidence that such negligence, if you have so found, was a proximate cause of the injuries, if any, sustained by plaintiff Richard McAllister at the time and on the occasion in question?

907

XXV.

Plaintiff objects and excepts to the Court's submission of Special Issue No. 10, predicated as it was on Special Issue No. 9 inquiring of the jury whether the steps were coated with oil, whether such oil was on such steps for a period of time that the defendant's officers, agents or employees should have discovered and removed it, because such issue is improper in that the plaintiff's pleading alleged that the defendant was negligent in having oil on such steps, the evidence raising the issue that the employees of the defendant have been walking from the oil barge onto the J. C. STEPHENS, tracking the oil on said steps.

Plaintiff objects and excepts to the manner in which the Court submitted Special Issue No. 34 because such issue does not take into consideration that in addition to wages the plaintiff McAllister earned during his employment with the defendant his meals and lodging during the time he was aboard the vessel and said element of damages has not been included in Special Issue No. 34. Therefore, Plaintiff here and now requests the Court to submit a charge which will include, among other things, damages sustained until the date of trial, as well as in the future, containing substantially the following language

(a) The present reasonable cash value of the loss, if any, that plaintiff Richard McAllister, has sustained of any wages, if any, including the reasonable value of his meals and lodging, if any, you may find from a preponderance of the evidence he may have sustained to the date of trial, if you find there has been any such loss;

(b). His diminished capacity to labor and earn money in the future, including the reasonable value of his meals and lodging, if you find there would reasonable and probably be any such loss in the future,
908 and a further instruction reading as follows:

In answering Special Issue No. 34 you will not take into consideration nor allow plaintiff any sum of money for the reasonable value of meals and lodging from the date he has left the employ of the defendant to the date you may find in answer to Special Issue No. 33.

XXVII.

Plaintiff further objects and excepts to the Court's failure to submit special issue inquiring of the reasonable expense of doctors, hospitals, nurses bills and medicines from October 19, 1950 to date of trial and such medical, hospital and nurse bills plaintiff may incur in the future and beyond the date of trial, said issue having been by plaintiff specifically requested of the Court and the Court refused it: said issue being a material issue in that under the facts in this case plaintiff was entitled to reasonable cost of medical care and attention, including doctors, hospital and nurses bills, regardless of any finding on the part of the jury of culpable negligence or unseaworthiness of the port-holes or windows in question proximately causing plaintiff's injuries.

MANDELL & WRIGHT

By ARTHUR J. MANDELL

Attorneys for Plaintiff,

200 Republic Building

Houston 2, Texas.

The above and foregoing objections and exceptions to the Court's charge having been presented to me in due time and having been considered, and having also been submitted to opposing counsel for examination as required by law before the Court's main charge was read to the jury and was separately and collectively considered by the Court and was collectively and separately overruled, to which action of the Court plaintiff then and there duly excepted.
909

CHAS. E. LONG, Jr., /s/
Judge

Objections as appearing in Paragraphs 1-5-9-10-11-12-
13-14-15-16-17-18-19-20-21-22-23 and 24 and of these objections
and exceptions are waived.

ARTHUR J. MANDELL /s/

(File Endorsement Omitted)

910 IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS,

134TH JUDICIAL DISTRICT

(Title Omitted)

Stipulation—Filed April 14, 1955

IT IS STIPULATED AND AGREED that after the jury retired to deliberate in the above case within twenty to thirty minutes thereafter, the jury sent out a *single question relating to seaworthiness* addressed to Judge Long, the full text of which appears in the record of this case.

/s/ CHAS. E. LONG, JR.
Judge

MAGNOLIA PETROLEUM COMPANY

By /s/ FRANK C. BOLTON JR.

Attorney for Defendant

MANDELL & WRIGHT,

By /s/ ARTHUR J. MANDELL

Attorneys for Plaintiff

(File Endorsement Omitted)

911 IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS,

134TH JUDICIAL DISTRICT

No. 90-186-A

RICHARD McALISTER

v.

MAGNOLIA PETROLEUM COMPANY

Judgment—Entered April 25, 1955.

On this 7th day of March, 1955, came on to be heard
the above entitled and numbered cause, wherein Richard

McAllister is plaintiff and Magnolia Petroleum Company, a Texas corporation, is defendant, and came the parties plaintiff and defendant and announced ready for trial, and came a jury of twelve good and lawful men, consisting of James H. Brown and eleven other duly impaneled and qualified jurors, who, after having been sworn and having heard the pleadings and evidence and the argument of counsel, for their verdict, in response to the following special issues, definitions, and explanatory instructions submitted to them by the court, on the 11th day of March 1955 made the following respective findings:

This case is submitted to you on special issues—that is, you are called on to answer some questions as to particular facts in the case, from the evidence you have heard in the trial. You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony, but in matters of law, you must be governed by the instructions in the charge. In discharging your responsibility on this jury, please remember that there are standards of conduct to be lived up to, and rules to be obeyed, and that if you do not comply with them, our efforts will be wasted.

1. Do not let bias, prejudice, sympathy, resentment, or any such emotion play any part in your deliberations.

2. During the time of your deliberations do not discuss the case, or even mention it to anyone whomsoever, nor permit it to be mentioned in your hearing, except in the jury room when all jurors are present for the purpose of deliberations on the verdict.

3. Do not speculate on matters not shown by the evidence, and about which you are not asked any questions. Remember that you cannot guess your way to a just and correct verdict.

4. Be very careful not to consider or mention any personal knowledge or information you may have about any fact or person, which is not shown by the evidence you have heard in this trial. Do not try to gather any evidence for yourselves. Your duty is to

answer these questions from the evidence you have heard here, and from that alone.

5. Do not try to reach a verdict by lot, or chance, and do not return a quotient verdict, by adding together figures, dividing by the number of jurors, and agreeing to be bound by the result. Do not do any trading on your answers—that is, some of you agreeing to answer certain questions one way if others will agree to answer other questions another way. All questions must be answered by a unanimous vote and not by a majority vote.

6. Do not decide who you think should win, and then try to answer the questions accordingly. If you do that, your verdict will be worthless, and all of our time will have been wasted. Simply answer the questions as you find the facts from the evidence without concerning yourselves about the effect of your answers.

913

7. Keep these rules in mind at all times, and obey them strictly, until you have returned your verdict. The verdict will consist of your answers to the questions, written in the blanks provided, with the certificate signed by your foreman on the last page of the charge.

"Preponderance of the evidence," as that term is used in this charge, means the greater weight and degree of credible testimony before you.

"Negligence", as that term is used in this charge, means a failure to exercise ordinary care.

"Ordinary care", as that term is used in this charge, means that degree of care which would be exercised by a person of ordinary prudence, under the same or similar circumstances.

"Proximate cause", as that term is used in this charge, means that cause which in its natural and continuous sequence, unbroken by any new and independent cause, produces a result that would not have occurred but for such cause, and which said result, or some like result, ought reasonably to have been foreseen or anticipated in the light of the attending circumstances.

There may be more than one proximate cause of an event.

"Natural and continuous sequence", as that term is used in this charge, means the usual and ordinary succession of events.

Bearing in mind the foregoing definitions and instructions, you will answer the following special issues:

SPECIAL ISSUE No. 1

Do you find from a preponderance of the evidence, that on or about October 19, 1950, plaintiff Richard A. McAllister received an injury to his body while attempting to walk down the stairs leading from the lounge to the galley of the M/V J. C. Stephens?

Answer "yes" or "no".

ANSWER: Yes.

SPECIAL ISSUE No. 2

Do you find from a preponderance of the evidence that, at the time and on the occasion in question, the portholes or windows over and near the galley stair, leading to and from the lounge of the crew ship in question were not in a watertight condition?

Answer "They were not" or "They were".

ANSWER: They were not.

If you have answered the preceding special issue "They were not", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 3

Do you find from a preponderance of the evidence that the portholes or windows in question not being in a watertight condition, if you have so found in answer to special issue No. 2, made the crew ship in question "unseaworthy", as defined herein?

You are instructed that the term "unseaworthy", as used herein, means that a vessel with its appliances and fittings is not reasonably fit for the purposes for which it is being used.

Answer "Yes" or "No".

ANSWER: No.

If you have answered the preceding special issue "Yes", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 4

Do you find from a preponderance of the evidence that the unseaworthy condition, if any you have found in answer to the preceding special issue, of the crew ship in question, was a proximate cause of the injuries, if any, sustained by the plaintiff McAllistar at the time and on the occasion in question?

Answer "Yes" or "No".

ANSWER:

If you have answered special issue No. 2 "They were not", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 5.

Do you find from a preponderance of the evidence that, at the time and on the occasion in question, the failure of the defendant, its officers, agents and employees to keep in a watertight condition the portholes or windows over and near the steps leading to and from the galley and lounge of the crew ship in question, was negligence, as defined herein?

Answer "Yes" or "no".

ANSWER: No.

If you have answered the preceding special issue "Yes", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 6

Do you find from a preponderance of the evidence that such negligence, if any you have found in answer to the preceding special issue, was a proximate cause of the injuries, if any, sustained by plaintiff McAllister at the time and on the occasion in question?

Answer "Yes" or "No".

ANSWER:

SPECIAL ISSUE No. 7

916

Do you find from a preponderance of the evidence that, at the time and on the occasion in question, the defendant, its officers, agents and employees failed to keep in "proper repair" the portholes, or windows and their gaskets and attachments located over and near the lounge stairs leading to and from the galley of the crew ship in question?

You are instructed that the term "proper repair", as used herein, means that state of repair or condition which an ordinary prudent person in the exercise of ordinary care would have maintained the portholes or windows and gaskets and attachments under the same or similar circumstances.

If your answer is in the affirmative, let the form of your answer be "It did fail"; otherwise, let the form of your answer be "No."

ANSWER: No.

If you have answered the preceding special issue "It did fail", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 8

Do you find from a preponderance of the evidence that such failure, if any you have found in answer to the preceding special issue, was a proximate cause of the injuries, if any, sustained by plaintiff McAllister at the time and on the occasion in question?

Answer "Yes" or "No".

ANSWER:

SPECIAL ISSUE No. 9

917

Do you find from a preponderance of the evidence that, at the time and on the occasion in question, the top step of the galley stairs leading to and from the lounge on the M/V J. C. Stephens was coated with oil?

Answer "yes" or "No".

ANSWER: No.

If you have answered the preceding special issue "Yes", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 10

Do you find from a preponderance of the evidence that the top step of the galley-lounge stairs in question was coated with oil, if you have so found, for such a period of time that the defendant's officers, agents or employees should have discovered and removed it?

Answer "It was" or "It was not".

ANSWER:

If you have answered the preceding special issue "It was", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 11

Do you find from a preponderance of the evidence that the defendant's officers, agents or employees' act in permitting the oil coating, if any, on the top step of the galley-lounge stairs was negligence, as defined herein?

Answer "Yes" or "No".

ANSWER:

If you have answered the preceding special issue "Yes", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 12

Do you find from a preponderance of the evidence that such negligence, if any you have found in answer to the preceding special issue, was a proximate cause of the injuries, if any, sustained by plaintiff McAllister at the time and on the occasion in question?

Answer "Yes" or "No".

ANSWER:

SPECIAL ISSUE No. 13

Do you find from a preponderance of the evidence that, at the time and on the occasion in question, the deck above the M/V J.C. Stephens galley was not watertight?

If your answer is in the affirmative, let the form of your answer be "It was not"; otherwise, let the form of your answer be "It was".

ANSWER: It was not.

If you have answered the preceding special issue "It was not", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 14

Do you find from a preponderance of the evidence that the deck above the galley not being watertight, if you have so found in answer to special issue No. 13, made the crew ship in question "unseaworthy", as defined herein?

You are instructed that the term "unseaworthy" as used herein, means that a vessel with its appliances and fittings is not reasonably fit for the purposes for which it is being used.

Answer "Yes" or "No".

ANSWER: No.

919 If you have answered the preceding special issue "Yes"; then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 15

Do you find from a preponderance of the evidence that the unseaworthy condition, if any you have found in the preceding special issue, of the crew ship in question was a proximate cause of the injuries, if any, sustained by the plaintiff McAllister, at the time and on the occasion in question?

Answer "Yes" or "No".

ANSWER:

If you have answered special issue No. 13 "It was not", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 16

Do you find from a preponderance of the evidence that, at the time and on the occasion in question, the failure of the defendant, its officers, agents and employees to have the deck watertight above the M/V J. C. Stephens galley was negligence, as defined herein?

Answer "Yes" or "No".

ANSWER: No.

If you have answered the preceding special issue "Yes", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 17

Do you find from a preponderance of the evidence that such negligence, if any you have found in answer to the preceding special issue, was a proximate cause of the injuries, if any, sustained by plaintiff McAllister at the time and on the occasion in question?

920 Answer "Yes" or "No".

ANSWER:

SPECIAL ISSUE No. 18

Do you find from a preponderance of the evidence that, at the time and on the occasion in question the plaintiff McAllister attempted to descend the stairs in question without using the overhead grab iron?

Answer "Yes" or "No".

ANSWER: Yes.

If you have answered the preceding special issue "Yes", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 19

Do you find from a preponderance of the evidence that the plaintiff's attempt to descend the stairs without using the overhead grab iron, if you have so found in answer to the preceding special issue, was negligence, as defined herein?

Answer "Yes" or "No".

ANSWER: No.

If you have answered the preceding special issue "Yes", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 20

Do you find from a preponderance of the evidence that such negligence, if any you have found in answer to the preceding special issue, was a proximate cause of the injuries, if any, sustained by plaintiff McAllister at the time and on the occasion in question?

Answer "Yes" or "No".

ANSWER:

SPECIAL ISSUE No. 21

Do you find from a preponderance of the evidence that the plaintiff McAllister, at the time and on the occasion in question, attempted to descend the ladder without facing the steps thereof?

Answer "Yes" or "No".

ANSWER: Yes.

If you have answered the preceding special issue "yes", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 22

Do you find from a preponderance of the evidence that plaintiff's attempt to descend the ladder without facing the steps thereof, if you have so found in answer to the preceding special issue, was negligence, as defined herein?

Answer "Yes" or "No".

ANSWER: No.

If you have answered the preceding special issue "Yes", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 23

Do you find from a preponderance of the evidence that such negligence, if any you have found in answer to the preceding special issue, was a proximate cause of the injuries, if any, sustained by the plaintiff McAllister at the time and on the occasion in question?

Answer "Yes" or "No".

ANSWER:

SPECIAL ISSUE No. 24

Do you find from a preponderance of the evidence that, at the time and on the occasion in question, the plaintiff McAllister attempted to descend the stairs without making proper use of the handrail at the side of the stairs?

You are instructed that the words "proper use" means such use as a person of ordinary pru-

dence in the exercise of ordinary care would have made under the same or similar circumstances.

Answer "Yes" or "No".

ANSWER: No.

If you have answered the preceding special issue "Yes", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 25

Do you find from a preponderance of the evidence that plaintiff McAllister's attempt to descend the stairs without making proper use of the handrail, if you have so found in answer to the preceding special issue, was a proximate cause of the injuries, if any, sustained by McAllister at the time and on the occasion in question?

Answer "Yes" or "No".

ANSWER:

SPECIAL ISSUE No. 26

Do you find from a preponderance of the evidence that the soles of plaintiff McAllister's shoes had become wet with water before he attempted to descend the galley steps on the occasion in question?

Answer "Yes" or "No".

ANSWER: Yes.

If you have answered the preceding special issue "Yes", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 27

923. Do you find from a preponderance of the evidence that plaintiff McAllister's attempt to descend the galley stairs while the soles of his shoes were wet with water, if you have so found in answer to the preceding special issue, was negligence as defined herein?

Answer "Yes" or "No".

ANSWER: No.

If you have answered the preceding special issue "Yes", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 28

Do you find from a preponderance of the evidence that such negligence, if any you have found in answer to the preceding special issue, was a proximate cause of the injuries, if any, sustained by plaintiff McAllister at the time and on the occasion in question?

Answer "Yes" or "No".

ANSWER:

SPECIAL ISSUE No. 29

Do you find from a preponderance of the evidence that, at the time and on the occasion in question, the failure of the plaintiff McAllister to remove the water from the steps on the ladder before undertaking to descend the steps was negligence, as defined herein?

Answer "Yes" or "No".

ANSWER: No.

If you have answered the preceding special issue "Yes", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 30

Do you find from a preponderance of the evidence that such negligence, if any you have found in answer to the preceding special issue, was a proximate cause of the injuries, if any, sustained by plaintiff McAllister at the time and on the occasion in question?

Answer "Yes" or "No".

ANSWER:

SPECIAL ISSUE No. 31

Do you find from a preponderance of the evidence that the injuries, if any, sustained by plaintiff McAllister, at the time and on the occasion in question, were not the result of an unavoidable accident?

Let the form of your answer be "They were not the result of an unavoidable accident" or "They were the result of an unavoidable accident."

In connection with the foregoing special issue you are instructed that the term "unavoidable accident" means an event occurring without the negligence of

plaintiff McAllister or the defendant Magnolia Petroleum Company, its officers, agents or employés.

ANSWER: They were the result of an unavoidable accident.

If you have answered special issues Nos. 20, 23, 25, 28 and 30 "yes", or if you have answered "yes" to any of them, and only in such event, then answer the following special issue:

SPECIAL ISSUE No. 32

From a preponderance of the evidence, what proportion do you find that the negligence, if any, on the part of the plaintiff Richard McAllister, bore to the combined negligence, if any you have found, of the plaintiff and defendant?

Answer by stating the per cent.

ANSWER:

925

SPECIAL ISSUE No. 33

From a preponderance of the evidence on what date, if any, do you find that plaintiff Richard McAllister has reached, or will reach his maximum recovery beyond which his condition could not be improved by the ordinary treatment known to medical science?

Answer by giving the date, if any.

You are instructed that by the term "ordinary treatment known to medical science" is meant such medical care, attention, surgery, and home treatments as in reasonable probability was or will be expected to be of some benefit to Richard McAllister, beyond which his condition could not be improved by such ordinary treatment known to medical science.

Sept. 11, 1956

SPECIAL ISSUE No. 34

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence will reasonably and fairly compensate Richard McAllister for his loss of earnings in the past, if you find there has been any in the past, and for his diminished capacity to labor and earn money in the future, if you find there will reasonably and probably be any in the future, and

for his physical pain and mental suffering in the past, if you find there has been any in the past, and in the future; if you find there will reasonably and probably be any in the future, and for his reasonable and necessary doctors and hospital bills in the past, if you find there have been any in the past, and in the future, if

926 you find there will reasonably and probably be
any in the future, directly and proximately resulting from the fall, if any, of the plaintiff

McAllister on the occasion in question.

Answer in dollars, if any, and cents, if any.

ANSWER: \$32,500.00,

which findings were received by the Court and were filed and entered of record on the minutes of such court; and the court being of the opinion that judgment should be rendered on the verdict, and the Court further finding from the undisputed evidence that plaintiff's disability manifested itself while he was attached to the M/V J. C. STEPHENS, and the jury in response to Special Issue No. 33 found that plaintiff would reach his maximum recovery beyond which his condition could not be improved by the ordinary treatment known to medical science to be September 11, 1956, therefore, plaintiff is entitled to maintenance at the stipulated rate of Six Dollars (\$6.00) per day:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that plaintiff do have and recover of and from the defendant his maintenance from August 19, 1953, being the last day of plaintiff's employment with the defendant until September 11, 1956, less 55 days during which plaintiff was employed, a total of one thousand forty three (1043) days at the rate of Six Dollars (\$6.00) per day, making a total of Six Thousand Two Hundred Fifty-eight and No/ 100 Dollars (\$6,258.00) due by the defendant to the plaintiff, without prejudice to plaintiff's right to claim maintenance beyond September 11, 1956, if he should show himself entitled to such maintenance; that this judgment in the sum of Six Thousand Two Hundred Fifty-eight Dollars (\$6,258.00) bear interest at the rate of six per cent.

(6%) from the date of judgment until paid, plus 927 costs of court, for which let execution issue.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff take nothing against the defendant, Mag.

nolia Petroleum Company, for compensatory damages, loss of earnings or earning capacity, or for pain and suffering, past or future, by reason of his injuries or any consequence thereof under the cause of action asserted by plaintiff under the Jones Act and/or for unseaworthiness under the maritime law.

To which judgment both plaintiff and defendant then and there in open court duly excepted.

Entered this 25th day of April, 1955.

/s/ CHAS E. LONG, JR.
Judge 134th District Court,
Dallas County, Texas.

(File Endorsement Omitted)

928 Clerk's Certificate to foregoing paper omitted in printing.

929 IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS
134TH JUDICIAL DISTRICT

(Title Omitted)

Plaintiff's Motion for New Trial—Filed April 30, 1955

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW RICHARD McALLISTER, Plaintiff in the above entitled and numbered cause, and files this his original motion for new trial and hereby moves and asks the Court to set aside that portion of the verdict of the jury and the judgment of the Court wherein Plaintiff was denied compensatory damages, and grant him a new trial herein on such portions of said judgment heretofore rendered against him upon each and all of the following grounds, to-wit:

I.

The Court erred in submitting to the jury Special Issue No. 3 over plaintiff's objection for the following reasons:

(a) That such Special Issue No. 3, inquiring of the jury whether the fact that the portholes or windows of the J. C. STEPHENS were not in a watertight condition made

the crew ship unseaworthy, submitted to the jury a question of law and not one of fact. The question of what constitutes "unseaworthy" in law is answered by the fact question of whether or not the portholes or windows were not watertight.

(b) That said Special Issue No. 3, as drawn, was in fact not raised by the evidence since plaintiff's theory of the case was not that the entire vessel was unseaworthy but that the portholes and windows were not watertight, and as such, the portholes or windows were in law unseaworthy.

930 (c) That such special issues placed a greater burden of proof upon the plaintiff than the one required by law; because, when the jury found, as indeed it did, that the portholes or windows in question were not in a watertight condition, then the jury, in effect, found such windows and portholes to be unseaworthy. Therefore, Special Issue No. 3 was erroneous and instead the Court should have submitted as Special Issue No. 3, conditioned upon an affirmative answer to Special Issue No. 2, the following issue:

"Do you find from a preponderance of the evidence that the portholes and windows over and near the galley stairs leading to and from the lounge on the M/V J. C. STEPHENS not being in a watertight condition, if you have so found, was a proximate cause of the injuries, if any, sustained by the plaintiff Richard McAllister, at the time and on the occasion in question?

II.

The Court erred in failing to submit the requested Special Issue No. 3 reading as follows:

"If you have answered the preceding special issue 'They were not', then you will answer the following special issue; otherwise, you need not answer it:

SPECIAL ISSUE No. 3

"Do you find from a preponderance of the evidence that the portholes or windows over and near the galley stairs leading to and from the lounge of the crew ship in question not being in a watertight condition, if you have so found, was a proximate cause of the injuries, if any, sus-

tained by the plaintiff Richard McAllister at the time and on the occasion in question.

Answer 'Yes', or 'No.'

III.

The Court erred in submitting the definition of
931 "unseaworthy" in connection with said Special Issue No. 3, over the objection of plaintiff, for the following reasons:

- (a) That such definition was improper, highly prejudicial and confusing in that such definition lead the jury to believe that before they could answer Special Issue No. 3 "Yes", under the facts in this case, they must have found the vessel *as a whole* unseaworthy rather than the portholes or windows as inquired about in Special Issue No. 3.
- (b) That the definition as given by the Court constituted an improper application of the law to the facts in the case and placed a greater burden upon plaintiff than required by law.
- (c) That the Court's definition in fact places an impossible burden upon plaintiff, not contemplated by law, in that under the Court's definition plaintiff had to prove that the unseaworthiness of the portholes or windows, i.e., their not being watertight, rendered, as a factual proposition, the entire vessel unseaworthy, which, of course, was an impossible burden since a vessel such as the J. C. STEPHENS could transport crews for the rigs to and from and over the Gulf of Mexico without sinking, and, therefore, may well have been "reasonably fit for the purpose for which *it* (the vessel) was being used"; yet have unseaworthy portholes or windows which proximately caused plaintiff's injuries. However, under the Court's instructions, since the vessel was reasonably fit to navigate upon the Gulf of Mexico to and from port to location, the jury could not answer Special Issue No. 3 in the affirmative.

IV.

The Court erred in failing to submit to the jury the definition properly and timely requested by plaintiff in
932 connection with Special Issue No. 3 reading as follows:

"You are instructed that by the term 'unseaworthy', as used herein, is meant that the portholes or windows over-

and near the galley stairs leading to and from the lounge of the crew ship in question were not reasonably fit for the purposes for which said portholes or windows were used."

V.

The Court erred in submitting to the jury Special Issue No. 14 over plaintiff's objection for the following reasons:

(a) That such special Issue No. 14 inquiring of the jury whether the deck above the galley not being in a watertight condition made the crew ship unseaworthy submitted to the jury a question of law and not one of fact. The question of what constitutes "unseaworthy", in law, is answered by the fact question of whether or not the deck above the galley was not watertight.

(b) That said Special Issue No. 14, as drawn, was in fact not raised by the evidence since plaintiff's theory of the case was not that the entire vessel was unseaworthy but that the deck above the galley was not watertight, and, therefore, the deck above the galley was, in law, unseaworthy.

(c) That such special issue placed a greater burden of proof upon the plaintiff than the one required by law because had the jury found, as indeed it did, that the deck above the galley was not in a watertight condition, then the jury had in effect found such deck to be unseaworthy. Therefore, Special Issue No. 14 was erroneous and instead the Court should have submitted as Special Issue No. 14, conditioned upon an affirmative answer to Special Issue No. 13, as follows:

"If you have answered the preceding Special Issue 933 'It was not', then you will answer the following special issue; otherwise you need not answer it:

SPECIAL ISSUE NO. 14

Do you find from a preponderance of the evidence that the deck above the galley not being watertight, if you have so found, was a proximate cause of the injuries, if any, sustained by the plaintiff Richard McAllister at the time and on the occasion in question.

VI.

The Court erred in failing to submit the requested Special Issue No. 14 reading as follows:

"If you have answered the preceding Special Issue 'It was not', then you will answer the following special issue; otherwise, you need not answer it:

SPECIAL ISSUE No. 14:

Do you find from a preponderance of the evidence that the deck above the galley not being watertight, if you have so found, was a proximate cause of the injuries, if any, sustained by the plaintiff Richard McAllister at the time and on the occasion in question?"

VII.

The Court erred in submitting the definition of "unseaworthy" in connection with said Special Issue No. 14, over the objection of plaintiff for the following reasons:

- (a) That such definition was improper, highly prejudicial and confusing in that such definition lead the jury to believe that before they could answer Special Issue No. 14 "yes," under the facts in this case, they must have found the vessel *as a whole* unseaworthy rather than the deck above the galley as inquired about in Special Issue No. 14.
- (b) That the definition as given by the Court constituted an improper application of the law to the facts in 934 the case and placed a greater burden upon plaintiff than required by law.
- (c) That the Court's definition in fact places an impossible burden upon plaintiff not contemplated by law, in that under the Court's definition plaintiff had to prove that the unseaworthiness of the deck above the galley, i.e., it not being watertight, rendered, as a factual proposition, the entire vessel unseaworthy, which, of course, was an impossible burden since a vessel such as the J. C. STEPHENS could transport crews for the rigs to and from and over the Gulf of Mexico without sinking, and, therefore, may well have been "reasonably fit for the purpose for which *it* (the vessel) was being used"; yet have an unseaworthy deck which proximately caused Plaintiff's injuries. However, under the Court's instructions, since the vessel was reasonably fit to navigate upon the Gulf of Mexico to and from port to location, the jury could not answer Special Issue No. 14 in the affirmative.

VIII.

The Court erred in failing to submit the definition properly and timely requested by plaintiff in connection with Special Issue No. 14, reading as follows:

"You are instructed that by the term 'unseaworthy' as used herein, is meant that the deck above the galley of the crew ship in question was not reasonably fit for the purpose for which said deck was used."

IX.

The Court erred in failing to issue proper instructions to the jury in connection with Special Issue No. 3 after the jury retired and deliberated for about twenty to thirty minutes, at which time they sent out the following question relating to unseaworthiness reading as follows:

"Judge Long: In Special Issue 3 is the term, un-seaworthy referring to the vessel as a whole, or the three windows on the port side?" Signed "James H. Brown, foreman." To which question, over the objection of plaintiff's counsel, the Court replied as follows:

"Gentlemen of the Jury: The Court's charge contains definitions and instructions. I can instruct you no further." Signed "Charles E. Long, Jr., Judge"

X.

The Court erred in failing to answer the jury's question as requested by counsel for plaintiff, as follows:

"In reply to your question, you are instructed that the term 'unseaworthy' as given to you in connection with Special Issue No. 3 refers to the three windows on the port side because such failure to instruct the jury that the term 'unseaworthy' had reference to the three windows on the portside as fully developed by the testimony placed a greater burden upon the plaintiff than that required by law. That the above quoted instruction to be given to the jury in reply to their question was timely made and said special instruction properly requested of the Court and refused, to plaintiff's prejudice.

XI.

The Court erred in failing to substitute the definition of "unseaworthy" as given by the Court with the one as

originally requested by the plaintiff which, after the jury sent out their question was again requested by the plaintiff and submitted to the Court with the request that he substitute it for the Court's definition. Such definition being as follows:

"You are instructed that by the term 'unseaworthy', as used herein, is meant that the portholes and their fittings were not fit for the purposes for which such portholes were used."

936

XII.

The Court erred in receiving from the jury and adopting their answer to special Issue No. 5 which inquired of the jury whether defendant was negligent in failing to keep the portholes or windows in a watertight condition because

- (a) All of the evidence in the record showed that in the exercise of ordinary care such windows and portholes would have been made watertight.
- (b) The undisputed testimony showed that in the exercise of ordinary care the portholes or windows, gaskets or attachments can be maintained properly so that the portholes or windows may be watertight.
- (c) There was no evidence to support the answer of the jury to such issue.
- (d) There was insufficient evidence to support the negative answer of the jury to such issue.
- (e) The negative answer made by the jury was so against the overwhelming weight of the evidence as to be clearly erroneous.

XIII.

The Court erred in receiving from the jury and adopting their answer to Special Issue No. 7 which inquired of the jury whether defendant failed to keep in proper repair the portholes, or windows, gaskets and attachments because

- (a) The undisputed testimony showed that in the exercise of ordinary care the portholes or windows, gaskets and attachments can be maintained properly so that they would be watertight;

- (b) There was no evidence to support the answer of the jury to such issue.
 - (c) There was insufficient evidence to support the negative answer of the jury to such issue.
- 937 (d) The negative answer of the jury to such issue was so against the overwhelming preponderance of the evidence as to be clearly erroneous.

XIV.

The Court erred in receiving the verdict from the jury and erred in entering judgment thereon because of the irreconcilable conflict between Special Issue No. 2 wherein the jury found that the portholes or windows over and near the galley stairs leading to and from the lounge of the crew ship in question were not watertight and the jury finding in response to Special Issue No. 5 that defendant was not negligent in failing to keep the portholes or windows in a watertight condition, especially in view of the undisputed evidence that ordinary proper maintenance by qualified shipyard workers would make these portholes or windows watertight; that in fact they finally made them watertight sometime after the occurrence in question.

XV.

The Court erred in receiving the verdict from the jury and erred in entering judgment thereon because of the irreconcilable conflict between Special Issue No. 2 wherein the jury found that the portholes or windows over and near the galley stairs leading to and from the lounge of the crew ship in question were not watertight and the jury finding in response to Special Issue No. 7 that defendant did not fail to keep in "proper repair" the portholes or windows and their gaskets and attachments, especially in view of the undisputed evidence that ordinary proper maintenance by qualified shipyard workers would make these portholes or windows watertight; that in fact they finally made them watertight, i.e., in proper repair, sometime after the occurrence in question.

XVI.

The Court erred in receiving from the jury and adopting their answer to Special Issue No. 9 which inquired of the

jury whether the top step of the galley of the J. C. STEPHENS was coated with oil because

- (a) The negative answer of the jury to such issue was so against the overwhelming preponderance of the evidence as to be clearly erroneous.
- (b) There was no evidence to support that answer to the issue.
- (c) There was insufficient evidence to support a negative answer to such issue.

XVII.

The Court erred in receiving from the jury and adopting their answer to Special Issue No. 16 which inquired of the jury whether defendant was negligent in failing to have the deck above the galley watertight because

- (a) All of the evidence showed that in the exercise of ordinary care such deck would have been made watertight,
- (b) There was no evidence to support the answer of the jury to such issue.
- (c) There was insufficient evidence to support the negative answer of the jury to such issue.
- (d) The negative answer made by the jury was so against the overwhelming weight of the evidence as to be clearly erroneous.

XVIII.

The Court erred in permitting the witness Harry A. Barkley to testify as to the result of his test with a 172 pound man standing on a shoe sole on a step similar to, just like, or, the step of the M/V J. C. STEPHENS where the plaintiff testified that he fell because such witness's testimony showed on its face that it was not made under the same conditions as existed while the vessel was at sea taking heavy seas and waves.

XIX.

The Court erred in failing to sustain plaintiff's counsel's motion to strike such evidence for the reason that the same conditions did not exist at the time when the Barkley

tests were made as were present when Plaintiff fell, and it was, therefore, immaterial, irrelevant and highly prejudicial.

XX.

The Court erred in permitting the witness Raymond L. Vaniver to testify as to the result of his test as to the pull test made by placing a leather sole on a step similar to, just like, or, the step of the M/V J. C. STEPHENS where the plaintiff testified that he fell because such witness's testimony showed on its face that it was not made under the same conditions as existed while the vessel was at sea taking heavy seas and waves.

XXI.

The Court erred in failing to sustain plaintiff's motion to strike such evidence for the reason that the same conditions did not exist at the time when the Vaniver tests were made as were present when plaintiff fell, and it was, therefore, immaterial, irrelevant and highly prejudicial.

XXII.

The Court erred in submitting Special Issue No. 3 and the definition in connection with Special Issue No. 3 because the issue was confusing to the jury as evidenced by the question they sent out, and as further proof that such issue was in fact confusing to the jury and prejudicial to plaintiff's rights under the law, plaintiff hereto attaches sworn statements from such jurors as were willing to give sworn statements showing in fact that the Court's instructions were confusing to them and had the Court instructed the jury that by the term "unseaworthy" he had reference to the portholes or windows inquired about in Special Issue No. 2, that said Special Issue No. 3 would have been answer "Yes", in which event the jury would have been under the Court's instruction required to answer Special Issue No. 4, which they also would have answered "Yes", so it would have formed the basis upon which judgment in the sum of Thirty-two Thousand Five Hundred Dollars (\$32,500.00) for compensatory damages would have been entered in favor of plaintiff.

XXIII.

The Court erred in failing to submit the proper definition as requested by Plaintiff in connection with Special Issue No. 14, that by the term "unseaworthy" as used in connection with this issue is meant that the deck above the galley of the crew ship in question was not reasonably fit for the purpose for which said deck was used.

941. It appears from the sworn affidavits of the jurors, which affidavits are hereto attached, that they would have answered Special Issue No. 14 "Yes", and the proximate cause issue (No. 15) "Yes", all of which would have formed the basis of judgment in the sum of Thirty Two Thousand Five Hundred Dollars (\$32,500.00) for compensatory damages in favor of plaintiff.

XXIV.

The Court erred in failing to submit plaintiff's requested issue inquiring as to the reasonable expense of doctors, hospitals and medicines from October 19, 1950 to the date of trial and such medical, hospital and nurses bills plaintiff may incur in the future and beyond the date of trial because

(a) The evidence was undisputed that plaintiff was discharged from the United States Marine Hospital at Galveston, Texas, on August 4, 1953 as fit for duty in three days; that in truth and in fact, as the jury found in response to Special Issue No. 33, he was not fit for duty but was still suffering of herniation of the nucleus pulposis and in need of medical care and attention but was unable to get it and did not get it at the United States Marine Hospital; and since the jury found in response to Special Issue No. 1 that plaintiff did receive an injury to his body while attempting to walk down the stairs leading front the lounge to the galley on the M/V J. C. STEPHENS and further found that the time when his condition would become static would be September 11, 1956, plaintiff was, therefore, entitled to have the jury find the reasonable cost of his doctors' hospital, nurses bills, etc. The Court's failure to submit such an issue was prejudicial to plaintiff in that he was entitled under the facts in this case, to have the jury pass on 942. the amount of money for such past and future expenses.

(b) That such obligation was an absolute one and not dependent on negligence or unseaworthiness but as part of the old Maritime right to maintenance and cure.

WHEREFORE, Plaintiff Richard McAllister prays that his original motion for new trial be in all things sustained and granted, and that an order be entered herein setting aside such portion of the verdict of the jury and the judgment of this Court denying recovery for compensatory damages as heretofore rendered against this plaintiff, granting to plaintiff a new trial on the cause of action for compensatory damages in order that justice may be done and that Plaintiff have general relief.

MANDELL & WRIGHT

By ARTHUR J. MANDELL

ARTHUR J. MANDELL,

200 Republic Building,

Houston 2, Texas.

Affidavit of Leslie J. Bird

THE STATE OF TEXAS
COUNTY OF DALLAS.

Apr 6-1955

My name is Leslie J. Bird. My address is 5626 Southwestern Blvd., Dallas, Texas. I am Manager, Agency Dept. at National Bankers Life, and I am a Retired Naval Officer. I was a juror in the case of Richard McAllister vs. Magnolia Petroleum Company, No. 90,186-A, in the 134th Judicial District Court of Dallas County, Texas.

When we started to deliberate in order to give our answers to the questions given to us by the Judge we answered Question No. 1 that Mr. McAllister did fall on the stairs leading from the lounge to the galley on the J. C. STEPHENS.

Question No. 2 we answered that the windows over 943 and near the galley stairs leading to and from the lounge of the crew ship were not in a watertight condition. When we came to Question No. 3 asking the jury whether the portholes or windows on the J. C. STEPHENS not being in a watertight condition made the crew ship unseaworthy, as defined by the Court. We naturally carefully read over the Court's definition of "unseaworthy". The Court defined "unseaworthy" stating as follows:

"You are instructed that the term 'unseaworthy', as used herein, means that a vessel with its appliances and fittings is not reasonably fit for the purposes for which it is being used."

The Court's instructions puzzled us because the Court in his definition of unseaworthiness told us that before we can answer Question No. 3 "Yes", we had to find that the condition of the portholes or windows in not being in a watertight condition made the whole vessel unseaworthy. That is why our foreman sent out this question:

"Judge Long: In Special Issue 3 is the term unseaworthy referring to the vessel as a whole, or the three windows on the port side?"

Signed: James H. Brown, Foreman"

The Court replied that he could not give us any more instructions, which left us with the instruction that before we could answer Question No. 3 "Yes", we must find the condition of the port sides or windows made *the whole vessel* unseaworthy. We believed from the evidence that the portholes or windows over the stairs in question were not watertight, and, therefore, they were unseaworthy but we also believed that did not make the vessel as a whole unseaworthy, and for that reason we had to answer Question No. 3 "No". At the time we discussed the term "unseaworthiness" of the boat, I tried to remember the testimony as best I could but could not recall that this was a point of issue. I believe the other jurors thought the same. It was difficult for us that were familiar with boats and ships to understand the term unseaworthiness as the court defined it for us. It is definitely known that a few leaking portholes as in this case could never sink a boat of this type.

The way the questions were submitted to us, we were instructed by the Court not to answer Question No. 4 unless we answered Question No. 3 "Yes". Since we answered Question No. 3 "No", we did not answer Question No. 4. However, I know myself, and I know the rest of the jurors would have answered Question No. 3 "Yes", if the Judge would have replied to our question that the term "unseaworthy" referred to the three windows on the portside and not to the vessel as a whole. I also know I would have, and from the discussions the rest of the jurors had that they would have answered Question No. 4 "Yes", had we an-

swered No. 3 "Yes";—that is, the condition of the windows not being watertight was a cause or proximate cause of Mr. McAllister's injuries.

What I have stated here with reference to Questions Numbers 3 and 4 applies equally to questions Numbers 14 and 15, because in answer to Question No. 13 we did answer that the deck above the J. C. STEPHENS galley was not watertight, and had the court given us the proper instructions as to what is meant by "unseaworthiness", I, and the rest of the jurors I believe, would have answered questions No. 14 and 15 "Yes".

I am making this statement freely and voluntarily, and the facts set out therein are true and correct.

LESLIE J. BIRD /s/

SUBSCRIBED AND SWEARN TO BEFORE ME, a Notary
945 Public in and for Dallas County, Texas.

SEAL /s/ DWIGHT E. HILL Dwight E. Hill
Notary Public in and for
Dallas County, Texas.

Affidavit of E. S. Huber

THE STATE OF TEXAS
COUNTY OF DALLAS

My name is E. S. Huber. My address is 209 S. Beckley, Dallas, Texas. I am a partner in Frozen Foods, Furniture and Appliances Store, and I was a juror in the case of Richard McAllister vs. Magnolia Petroleum Company, No. 90186-A, in the 134th Judicial District Court of Dallas County, Texas.

When we started to deliberate in order to give our answers to the questions given to us by the Judge we answered Question No. 1 that Mr. McAllister did fall on the stairs leading from the lounge to the galley on the J. C. STEPHENS. Question No. 2 we answered that the windows over and near the galley stairs leading to and from the lounge of the crew ship were not in a watertight condition. When we came to Question No. 3 asking the jury whether the portholes or windows on the J. C. STEPHENS not being in watertight condition made the crew ship unseaworthy, as

defined by the Court. We naturally carefully read over the Court's definition of "unseaworthy". The Court defined "unseaworthy" stating as follows:

"you are instructed that the term 'unseaworthy', as used herein, means that a vessel with its appliances and fittings is not reasonably fit for the purposes for which it is being used."

The Court's instructions puzzled us because the Court in his definition of unseaworthiness told us that before we can answer Question No. 3 "Yes", we had to find that the condition of the portholes or windows in not being in a watertight condition made *the whole* vessel unseaworthy. That is why our foreman sent out this question:

"Judge Long: In Special Issue 3 is the term unseaworthy referring to the vessel as a whole, or the three windows on the port side?"

Signed: James H. Brown, Foreman.

The Court replied that he could not give us any more instructions which left us with the instruction that before we could answer Question No. 3 "Yes", we must find the condition of the portholes or windows made *the whole* vessel unseaworthy. We believed from the evidence that the portholes or windows over the stairs in question were not watertight, and, therefore, they were unseaworthy but we also believed that did not make the vessel as a whole unseaworthy, and for that reason we had to answer question No. 3 "No".

The way the questions were submitted to us, we were instructed by the Court not to answer Question No. 4 unless we answered Question No. 3 "Yes". Since we answered Question No. 3 "No", we did not answer Question No. 4. However, I know myself, and I know the rest of the jurors would have answered Question No. 3 "Yes", if the Judge would have replied to our question that the term "unseaworthy" referred to the three windows on the portside and not to the vessel as a whole. I also know I would have, and from the discussions the rest of the jurors had that they would have answered Question No. 4 "Yes", had we answered Question No. 3 "Yes"—that is, the condition of the windows not being watertight was a cause or proximate cause of Mr. McAllister's injuries.

What I have stated here with reference to Questions Numbers 3 and 4 applies equally to questions Numbers 14
947 and 15, because in answer to Question No. 13 we did
answer that the deck above the J. C. STEPHENS galley
was not watertight, and had the court given us the proper
instructions as to what is meant by "unseaworthiness" I,
and the rest of the jurors I believe, would have answered
Question No. 14 and Question No. 15 "Yes".

I am making this statement freely and voluntarily and
the facts set out in this statement are true and correct.

E. S. HUBER /s/

SUBSCRIBED AND SWORN TO before me, a Notary Public, in
and for Dallas County, Texas, this the 6 day of April, 1955.

O. R. HUBER, JR. /s/ SEAL
*Notary Public, Dallas
County, Texas.*

Affidavit of J. A. Foster

THE STATE OF TEXAS
COUNTY OF DALLAS

April 18, 1955

My name is J. A. Foster, I live at 6201 Petain Street,
Dallas, Texas. I was a juror in the case of Richard Mc-
Allister v. Magnolia Petroleum Company, No. 90186-A, in
the 134th Judicial District Court of Dallas County, Texas.
I wish to make the following statement to clarify my de-
cision as a juror. When we started to deliberate in order
to give our answers to the questions given to us by the
Judge we answered Question No. 1 that Mr. McAllister did
fall on the stairs leading from the lounge to the galley on
the J. C. STEPHENS. Question No. 2 we answered that the
windows over and near the galley stairs leading to and
from the lounge of the crew ship were not in a watertight
condition. When we came to Question No. 3 asking the
jury whether the portholes or windows on the J. C.
STEPHENS not being in a watertight condition made the
crew ship unseaworthy, as defined by the Court. We
948 naturally carefully read over the Court's definition
of "unseaworthy". The Court defined "unsea-
worthy" stating as follows:

"You are instructed that the term 'unseaworthy', as used herein, means that a vessel with its appliances and fittings is not reasonably fit for the purposes for which it is being used."

The Court's instructions puzzled us because the Court in his definition of unseaworthiness told us that before we can answer Question No. 3 "Yes", we had to find that the condition of the portholes or windows in not being in a watertight condition made the *whole* vessel unseaworthy. That is why our foreman sent out this question:

"judge Long: In Special Issue 3 is the term unseaworthy referring to the vessel as a whole, or the three windows on the port side"

Signed: James H. Brown, Foreman"

The Court replied that he could not give us any more instructions, which left us with the instruction that before we could answer Question No. 3 "Yes", we must find the condition of the portholes or windows made *the whole vessel* unseaworthy. We believed from the evidence that the portholes or windows over the stairs in question were not watertight, and, therefore, they were unseaworthy, but we also believed that did not make the vessel as a whole unseaworthy and for that reason we had to answer Question No. 3 "No". At the time we discussed the term "unseaworthiness of the boat, I tried to remember the testimony as best I could but could not recall that this was a point of issue. I believe the other jurors thought the same. It was difficult for us that were familiar with boats and ships to understand the term unseaworthiness as the court defined it for us. It is definitely known that a few leaking portholes as in this case could never sink a boat of this type.

949 The way the questions were submitted to us, we were instructed by the Court not to answer Question No. 4 unless we answered Question No. 3 "Yes". Since we answered Question No. 3 "No", we did not answer Question No. 4. However, I know myself, and I know the rest of the jurors would have answered Question No. 3 "Yes", if the Judge would have replied to our question that the term "unseaworthy" referred to the three windows on the portside and not to the vessel as a whole. I also know I would have, and from the discussions the rest of the jurors had that they would have answered Question No. 4 "Yes", had we answered No. 3 "yes";—that is, the con-

dition of the windows not being watertight was a cause or proximate cause of Mr. McAllister's injuries. What I have stated here with reference to Questions Numbers 3 and 4 applies equally to questions Numbers 14 and 15, because in answer to Question No. 13 we did answer that the deck about the J. C. STEPHENS galley was not watertight, and had the court given us the proper instructions as to what is meant by "unseaworthiness", I, and the rest of the jurors I believe, would have answered Questions No. 14 and 15 "Yes".

I am making this statement freely and voluntarily, and the facts set out therein are true and correct.

J. A. FOSTER /s/

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public in and for Dallas County, Texas.

JAMES Y. KUYKENDALL /s/

Notary Public in and for

Dallas County, Texas

SEAL

Affidavit of J. B. Flatt

THE STATE OF TEXAS
COUNTY OF DALLAS

My name is J. B. Flatt. I reside at 4439 Belden, Dallas, Texas. I am a cabinet maker, and I was a juror in 950 the case of Richard McAllister v. Magnolia Petroleum Company, No. 90186-A; in the 134th Judicial District Court of Dallas County, Texas.

When we started to deliberate in order to give our answers to the questions given to us by the Judge we answered Question No. 1 that Mr. McAllister did fall on the stairs leading from the lounge to the galley on the J. C. STEPHENS. Question No. 2 we answered that the windows over and near the gally stairs leading to and from the lounge of the crew ship were not in a watertight condition. When we came to Question No. 3 asking the jury whether the portholes or windows on the J. C. STEPHENS not being in a watertight condition made the crew ship unseaworthy, as defined by the Court, we naturally carefully read over the Court's definition of "unseaworthy". The Court defined "unseaworthy" stating as follows:

"you are instructed that the term 'unseaworthy' as used herein, means that a vessel with its appliances and fittings is not reasonably fit for the purposes for which it is being used."

The Court's instructions puzzled us because the Court in his definition of unseaworthiness told us that before we can answer Question No. 3 "Yes", we had to find that the condition of the portholes or windows in not being in a watertight condition made *the whole vessel* unseaworthy. That is why our foreman sent out this question:

"Judge Long: In Special Issue No. 3 is the term unseaworthy referring to the vessel as a whole or the three windows on the port side?"

Signed: James H. Brown, Foreman."

The Court replied that he could not give us any more instructions which left us with the instruction that before we could answer Question No. 3 "Yes", we must find that

the condition of the portholes or windows made *the whole vessel* unseaworthy. We believed from the

evidence that the portholes or windows over the stairs in question were not watertight, and therefore, they were unseaworthy but we also believed that did not make the vessel as a whole unseaworthy, and for that reason we had to answer Question No. 3 "No."

The way the questions were submitted to us we were instructed by the Court not to answer Question No. 4 unless we answered Question No. 3 "Yes". Since we answered Question No. 3 "No", we did not answer Question No. 4. However, I know myself, and I know the rest of the jurors would have answered Question No. 3 "Yes", if the Judge would have replied to our question that the term "unseaworthy" referred to the three windows on the portside and not to the vessel as a whole. I also know I would have, and from the discussions the rest of the jurors had that they would have answered Question No. 4 "Yes", had we answered Question No. 3 "Yes"—that is, the condition of the windows not being watertight was a proximate cause of Mr. McAllister's injuries.

What I have stated here with reference to Questions Numbers 3 and 4 applies equally to questions Numbers 14 and 15, because in answer to Question 13 we did answer that the deck above the J. C. STEPHENS galley was not watertight, and had the court given us the proper instruc-

tions as to what is meant by "unseaworthy" I, and the rest of the jurors, I believe, would have answered Question No. 14 and Question No. 15 "Yes."

I am making this statement freely and voluntarily and the facts set out in this statement are true and correct.

J. B. FLATT /s/

952 SUBSCRIBED AND SWORN TO BEFORE ME this the 18th day of April, 1955.

EARLINE VINSON /s/
Notary Public in and for
Dallas County, Texas

SEAL

Affidavit of Duard Terry

THE STATE OF TEXAS
COUNTY OF DALLAS

April 18, 1955

My name is Duard Terry. I live at 327 W. Elmore Street, Dallas, Texas. I was a juror in the case of Richard McAllister v. Magnolia Petroleum Company, No. 90186-A, in the 134th Judicial District Court of Dallas County, Texas. The following will help to clarify our decision in this case. When we started to deliberate in order to give our answers to the questions given to us by the Judge we answered Question No. 1 that Mr. McAllister did fall on the stairs leading from the lounge to the galley on the J. C. STEPHENS. Question No. 2 we answered that the windows over and near the galley stairs leading to and from the lounge of the crew ship were not in a watertight condition. When we came to Question No. 3 asking the jury whether the portholes or windows on the J. C. STEPHENS not being in a watertight condition made the crew ship unseaworthy, as defined by the Court. We naturally carefully read over the Court's definition of "unseaworthy". The Court defined "unseaworthy" stating as follows:

"You are instructed that the term 'unseaworthy', as used herein, means that a vessel with its appliances and fittings is not reasonably fit for the purposes for which it is being used."

The Court's instructions puzzled us because the Court in his definition of unseaworthiness told us that before we can answer Question No. 3 "Yes", we had to find that

the condition of the portholes or windows in "not
953 being in a watertight condition made the *whole* ves-
sel unseaworthy. That is why our foreman sent out
this question:

"Judge Long: In Special Issue 3 is the term unseaworthy
referring to the vessel as a whole, or the three windows on
the port side?"

Signed: James H. Brown, Foreman"

The Court replied that he could not give us any more instructions, which left us with the instruction that before we could answer Question No. 3 "Yes", we must find the condition of the portholes or windows made *the whole vessel* unseaworthy. We believed from the evidence that the portholes or windows over the stairs in question were not watertight, and, therefore, they were unseaworthy but we also believed that did not make the vessel as a whole unseaworthy, and for that reason we had to answer Question No. 3 "No". At the time we discussed the term "unseaworthiness of the boat, I tried to remember the testimony as best I could but could not recall that this was a point of issue. I believe the other jurors thought the same. It was difficult for us that were familiar with boats and ships to understand the term unseaworthiness as the Court defined it for us. It is definitely known that a few leaking portholes as in this case could never sink a boat of this type.

The way the questions were submitted to us, we were instructed by the Court not to answer Question No. 4 unless we answered Question No. 3 "Yes". Since we answered Question No. 3 "No", we did not answer Question No. 4. However I know myself, and I know the rest of the jurors would have answered Question No. 3 "Yes", if the Judge would have replied to our question that the term "unseaworthy" referred to the three windows on the port side and not to the vessel as a whole. I also know I 954 would have, and from the discussions the rest of the jurors had that they would have answered Question No. 4 "Yes", had we answered No. 3 "yes",—that is, the condition of the windows not being watertight was a cause or proximate cause of Mr. McAllister's injuries.

What I have stated here with reference to Questions Numbers 3 and 4 applies equally to questions Numbers 14 and 15, because in answer to Question No. 13 we did an-

swer that the deck above the J. C. Stephens galley was not watertight, and had the court given us the proper instructions as to what is meant by "unseaworthiness", I, and the rest of the jurors I believe, would have answered Questions No. 14 and 15 "Yes".

I am making this statement freely and voluntarily, and the facts set out therein are true and correct.

GUARD TERRY /s/

April 18, 1955,

SUBSCRIBED AND SWEORN TO BEFORE ME, a Notary Public in and for Dallas County, Texas.

THORNTON VICKREY /s/

Notary Public in and for

Dallas County, Texas

THORNTON VICKREY—

Notary Public,

Dallas Co.,

SEAL

Affidavit of James H. Brown

THE STATE OF TEXAS
COUNTY OF DALLAS

April 18, 1955

My name is James H. Brown. I live at 3534 Malden Lane, Dallas, Texas. I was foreman of the jury in the case of Richard McAllister v. Magnolia Petroleum Company, No. 90186-A, in the 134th Judicial District Court of Dallas County, Texas. The following will help to clarify our decision in this case. We we started to deliberate in order to give our answers to the questions given to us by the Judge we answered Question No. 1 that Mr. McAllister did fall on the stairs leading from the lounge to the galley on the J. C. STEPHENS. Question No. 2 we answered that the windows over and near the galley stairs leading to and from the lounge of the crew ship were not in a watertight condition. When we came to Question No. 3 asking the jury whether the portholes or windows on the J. C. STEPHENS not being in a watertight condition made the crew ship unseaworthy, as defined by the Court. We naturally carefully read over the Court's definition of "unseaworthy". The Court defined "unseaworthy" stating as follows:

"You are instructed that the term 'unseaworthy', as used herein, means that a vessel with its appliances and fittings is not reasonably fit for the purposes for which it is being used."

The Court's instructions puzzled us because the Court in his definition of unseaworthiness told us that before we can answer Question No. 3 "Yes", we had to find that the condition of the portholes or windows in not being in a watertight condition made the *whole* vessel unseaworthy. That is why our foreman sent out this question:

"Judge Long: In Special Issue 3 is the term unseaworthy referring to the vessel as a whole, or the three windows on the port side?"

Signed: James H. Brown, Foreman"

The Court replied that he could not give us any more instructions, which left us with the instruction that before we could answer Question No. 3 "Yes", we must find the condition of the portholes or windows made *the whole vessel* unseaworthy. We believed from the evidence that the portholes or windows over the stairs in question were not watertight, and, therefore, they were unseaworthy but we also believed that did not make the vessel as a whole unseaworthy, and for that reason we had to answer

956 Question No. 3 "No". At the time we discussed the

term "unseaworthiness of the boat, I tried to remember the testimony as best I could but could not recall that this was a point of issue. I believe the other jurors thought the same. It was difficult for us that were familiar with boats and ships to understand the term unseaworthiness as the court defined it for us. It is definitely known that a few leaking portholes as in this case could never sink a boat of this type.

The way the questions were submitted to us, we were instructed by the Court not to answer Question No. 4 unless we answered Question No. 3 "Yes". Since we answered Question No. 3 "No", we did not answer Question No. 4. However, I know myself, and I know the rest of the jurors would have answered Question No. 3 "Yes", if the Judge would have replied to our question that the term "unseaworthy" referred to the three windows on the portside and not to the vessel as a whole. I also know I would have, and from the discussions the rest of the jurors had that they would have answered Question No. 4 "Yes", had we

answered No. 3 "yes",—that is, the condition of the windows not being watertight was a cause or proximate cause of Mr. McAllister's injuries.

What I have stated here with reference to Questions Numbers 3 and 4 applies equally to questions Numbers 14 and 15, because in answer to Question No. 13 we did answer that the deck above the J. C. STEPHENS galley was not watertight, and had the court given us the proper instructions as to what is meant by "unseaworthiness", I, and the rest of the jurors I believe, would have answered Questions No. 14 and 15 "Yes".

I am making this statement freely and voluntarily, and the facts set out therein are true and correct.

JAMES H. BROWN /s/

957 SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public in and for Dallas County, Texas. 4-18-55.

LOU H. CABLAN /s/

Notary Public in and for
Dallas County, Texas.

LOU H. CABLAN

SEAL

(File Endorsement Omitted)

958 IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS,

134TH JUDICIAL DISTRICT

(Title Omitted)

Order Overruling Plaintiff's and Defendant's Motions for New Trial—June 7, 1955

On this the 27th day of May, 1955 came on to be heard the original motions for new trial of plaintiff and defendant in the above entitled and numbered cause; the court having found that each of such motions was duly filed, presented to the court in due time, manner and form, and with due notice, and the court having heard argument of counsel, is of the opinion that such motions, and each of them, be in all things overruled, and it is accordingly ORDERED, ADJUDGED AND DECREED, that each of such motions be and the same are hereby overruled, to which action of the court both plaintiff and defendant, each for himself,

excepted and gave notice of appeal to the Court of Civil Appeals of the Fifth Supreme Judicial District of Texas, sitting at Dallas, Texas.

Rendered and signed June 7, 1955.

/s/ CIRAS E. LONG, JR.

Judge Presiding

(File Endorsement Omitted)

958a Bond on appeal for \$500.00 approved and filed June 17, 1955 omitted in printing.

959 Clerk's Certificate to foregoing transcript omitted in printing.

960 IN THE COURT OF CIVIL APPEALS, FIFTH SUPREME JUDICIAL DISTRICT, AT DALLAS, TEXAS

NUMBER 15,050

RICHARD McALEISTER, Appellant,

VS.

MAGNOLIA PETROLEUM COMPANY, Appellee

Stipulation—Filed September 23, 1955

IT IS STIPULATED AND AGREED by and between the parties to this cause of action that after the jury retired to deliberate in the above case and within twenty to thirty minutes thereafter the jury sent out a single question relating to unseaworthiness addressed to Judge Long (Tr. p. 18), the full text of which read as follows:

"Judge Long: In special issue 3 is the term unseaworthy referring to the vessel as a whole, or the three windows on the port side?" Signed James H. Brown, Foreman."

That after the Court received such question from the jury the following transpired. Mr. Mandell dictated to the court reporter in the presence of the Court and opposing counsel the following:

"Mr. MANDELL: Now comes the plaintiff and requests the Judge to answer the Jury's question reading as follows:

"Judge Long: In special issue 3 is the term unseaworthy referring to the vessel as a whole, or the three windows on the port side?" Signed "James H. Brown, foreman."

961 Plaintiff requests the Judge to answer to the Jury.

"That the term 'unseaworthy,' as used in special issue No. 3 has reference to the three portholes or windows in question on the port side of the vessel, and at this time again resubmits to the Court the definition of 'unseaworthiness' as requested by the plaintiff reading as follows:

"You are instructed that by the term 'unseaworthy,' as used herein, is meant that the portholes and their fittings are not fit for the purpose for which such portholes are used."

Plaintiff objects to the Court's failure to submit such instruction and further objects to the Court's answer reading as follows:

"Gentlemen of the Jury: The Court's charge contains definitions and instructions. I can instruct you no further." Signed by the Court.
Which motion was by the Court overruled and plaintiff excepted."

It is not stipulated herein that any formal bill of exception was by the Appellant reduced to writing and submitted to the court for its approval or modification.

MANDELL & WRIGHT

By ARTHUR J. MANDELL
Attorneys for Appellant,
200 Republic Building
Houston 2, Texas

FRANK C. BOLTON, JR.

FRANK C. BOLTON, JR.

Attorney for Appellee,

Legal Department,
Magnolia Petroleum Company,

P. O. Box 900

Dallas 21, Texas

962 IN THE COURT OF CIVIL APPEALS, FIFTH SUPREME
JUDICIAL DISTRICT, AT DALLAS, TEXAS
FROM A DISTRICT COURT OF DALLAS COUNTY.

No. 15,050

RICHARD McALLISTER, Appellant,

v.

MAGNOLIA PETROLEUM Co., Appellee.

Opinion — March 1, 1956

This is an appeal by appellant Richard McAllister from a judgment denying him damages for personal injuries sustained October 19, 1950, when he slipped and fell down a ladder on appellee's motor vessel *J. C. Stephens*, of which appellant was a crew member; and a counter-appeal by appellee Magnolia Petroleum Company from a judgment awarding McAllister maintenance in the amount of \$6,258.00 covering a period from August 19, 1953 to September 11, 1956, without prejudice to his right thereafter to claim additional maintenance.

The Judiciary Act of 1789, 28 USCA, sec. 1333, is the basis for jurisdiction of maritime tort actions in State courts at the election of suitors. This suit was originally filed August 23, 1953 in a State court in Harris County, Texas and thereafter transferred to a district court in Dallas County under plea of privilege.

Appellant as plaintiff sued in three actions, or counts. In his first action, brought under Title 46, Section 688, USCA, commonly known as the Jones Act, he sought recovery for his personal injuries on the grounds of appellee's alleged negligence; in his second action, brought under the general maritime law, he sought recovery for his personal injuries on the grounds of the alleged unseaworthiness of the vessel, not based on negligence; and in his third action he sought recovery under the general maritime law for the cost of his maintenance since the date of his injury. It has been held that it is permissible to combine these actions in one suit, though only one recovery may be had for personal injuries. *McCarthy v. American-Eastern Corp.*, 175 F. 2d 724; Cert. den. 338 U.S. 868, 70 S. Ct. 144; 79 C.J.S. 714, 715. Recovery for maintenance may

422

963 be had in addition to compensation for personal injuries. 79 C.J.S., 665, note 77; 714-715; notes 38 and 39.

In the case now before us a jury returned answers unfavorable to appellant both on issues of negligence and on issues of unseaworthiness. Based on these answers the trial court rendered judgment denying appellant recovery for his personal injuries.

In this appeal appellant does not complain of the adverse verdict or judgment with reference to negligence as alleged in his action brought under the Jones Act. He does complain of alleged errors in admitting evidence and in the submission of special issues to the jury in connection with his action for personal injuries based on unseaworthiness independent of negligence as alleged in his action or count brought under the general maritime law.

At the outset we are met by appellee's insistence that appellant's second count—the count seeking recovery for unseaworthiness independent of negligence—is barred by our two-year statute of limitations. Art. 5526, sec. 6, VACS. Consequently, says appellee, errors, if any, in admitting evidence and in submitting issues must be considered harmless and the trial court's judgment on the first two counts should be affirmed.

To this, appellant replies that the Jones Act provides by reference to the Federal Employers Liability Act (Title 45, sec. 56, USCA) for a limitations period of three years, 79 C.J.S. 719, and that this provision is applicable also to an action for unseaworthiness under the general maritime law. And further, that the two actions are so closely related that a reversal as to the second count necessarily requires a reversal and new trial on both counts.

In order to pass on these conflicting contentions it is necessary for us briefly to compare the two actions with reference to their nature and differences, and the rights which may be asserted under each of them.

964 In an action under the Jones Act, enacted in 1920, a plaintiff to recover damages is required to prove negligence as the proximate cause of his injuries. The fellow servant doctrine and assumption of risk are not ordinarily defenses; and contributory negligence is not a complete defense, though it may operate to mitigate damages under the principle of comparative negligence. Negli-

gence is the essence of the action. In the absence of negligence there can be no recovery under the Jones Act for injuries caused by unseaworthiness. Under the statute a recovery may be had for the death of a seaman. 79 C.J.S. 668, 674; 681; 692; 695; 702.

On the other hand, in an action under the general maritime law a plaintiff is required to prove simply that the vessel's unseaworthiness was a proximate cause of his injuries. It is the shipowner's duty under general maritime law to furnish a seaworthy vessel, and if he fails to do so, he is liable for injuries caused by the vessel's unseaworthiness, though the owner may not have been in any way negligent. Negligence furnishes no basis for recovery. It is not permissible under general maritime law to maintain a suit seeking recovery on the grounds of negligence. And no recovery at all is allowed for the death of a seaman. 79 C.J.S. 662; 663; 679; 681; 690; 694; 702.

An action for negligence is statutory in nature, and has been permitted only since the passage of the Jones Act by the Congress in 1920. An action for unseaworthiness not coupled with negligence is not statutory in nature, but is based on general maritime law as developed over the years long prior to 1920. The rights granted to seamen under the statute are in addition to the rights allowed them under the general maritime law. 79 C.J.S. 664, 665.

In our opinion the two causes of action are separate, distinct, and severable. They do not necessarily rise and fall together. We quote from *Kunschman v. United States*, 54 F. 2d 987, at p. 989: "The above mentioned

statute under which this action was brought gives to a seaman, in addition to his rights under the maritime law, new rights and remedies, and also gives his personal representative a cause of action for death. *Charles Nelson v. Curtis* (C.C.A.) 1 F. 2d 774. These rights and remedies are those possessed by railway employees and their personal representatives under the laws of the United States. *Panama R. R. v. Johnson*, 264 U.S. 375, 44 S. Ct. 391, 68 L. Ed. 748. As this action was brought by the personal representative to recover damages for the death of the seaman, the rights of the parties depend upon the statute and not upon the general maritime law, under which there can be no recovery on a death-claim (Citing authorities).¹² See also *Turcich v. Liberty Corp.*, 217 F. 2d 495; *Carstens v.*

Great Lakes Towing Co., 71 F. Supp. 394; and C.J.S. pp. 674; 679; 681. Appellant's right to maintain his suit based on unseaworthiness without negligence is controlled by the general maritime law. The Jones Act is not applicable. Therefore the limitations period of three years provided by the Jones Act does not apply to his action for unseaworthiness brought under the general maritime law.

We believe that appellee is correct in its contention that appellant's cause of action under general maritime law based on unseaworthiness without negligence is barred by our two-years law of limitations. When no period of limitations is specified in a Federal statute the limitation statute applicable is that of the State in which the action is brought: *Brady v. Daly*, 2 Cir., 175 U.S. 148 (1889); *Cope v. Anderson*, 3 Cir., 331 U.S. 461 (1947); *McLaine v. Rankin*, 9 Cir., 197 U.S. 154 (1905); *Hollingsworth v. Cities Service Oil Co.*, Tex.Civ.App., 199 SW 2d 266 (1946), err. ref., Cert. den. 332 U.S. 774. We think the same rule applies when a non-statutory Federal right is sought to be enforced in a state court. To be more specific, in 966 a case similar to this one the rule has been applied to the right of a seaman to sue for personal injuries in a state court under the general maritime law. *Bonam v. Southern Meirhaden Corp.*, 284 F. 362, quoting from *Chelentis v. Lukensbach*, 247 U.S. 378, 38 S.C. 502, 62 L. Ed. 1171. We sustain appellee's counter-point No. 1. Consequently the errors, if they are errors, presented in appellant's points on appeal must be considered harmless. Appellant's points are overruled.

We come now to consideration of appellee's cross-appeal. Appellee rests its appeal from the judgment for maintenance on four points: (1) Appellant voluntarily refused available treatment at the Galveston Marine Hospital; (2) there was no prayer for cure, or testimony that appellant was undergoing cure; (3) maintenance beyond the date of trial should not have been allowed; and, (4) it was error to assess all costs against appellee.

The record discloses that following his fall on the ship's stairs on October 19, 1950 appellant continued his employment as a member of the crew of the *J. C. Stephens* until July, 1953. There is testimony that during that time his back bothered him and that he tried unsuccessfully to obtain medical treatment. In March, 1953, at New Orleans,

La., he requested a surgical operation at the expense of his employer for a disc condition. Thereafter he continued to work, but continued to have trouble with his back, so was given a ticket of admission to the U. S. Public Health Service Hospital at New Orleans, where he was told he would be admitted as an in-patient. However appellant preferred to enter the U. S. Public Service Hospital at Galveston, Texas because he would be nearer his home in Houston, Texas. A transfer was arranged and appellant was treated at the Galveston hospital first as an out-patient and beginning July 1953 as an in-patient.

967 While an in-patient at the hospital appellant on August 4, 1953 employed counsel for the purpose of bringing suit against appellee. The same day, or the next day, he was discharged from the hospital "fit for duty in three days." The next day he went to Houston where he was given a "medico-legal examination" by a doctor. Thereafter he returned to Morgan City, Louisiana where he went back to work for appellee, continuing to work until August 19, 1953. On the last named date he was given a new letter of admission to the Marine Hospital at Galveston.

Appellee says in its brief that "appellant chose not to re-enter the hospital"; and that having thus voluntarily refused further treatment made available under the letter of August 19, 1953, appellant is not entitled to maintenance after that date. We agree with appellee that "where the seaman is tendered a marine hospital certificate, his refusal thereof relieves the employer of an obligation to provide additional maintenance and cure," as stated in Socony-Vacuum Oil Co. v. Premeaux, 187 SW 2d 690 at p. 703 (and cases cited in footnote).

But appellee has not pointed out any evidence in the record and we have found none that would support a finding that appellant refused the certificate, or "chose not to re-enter the hospital." On the contrary we find in the record this testimony by appellant: "Q. All right after you left August 4th, did you then return to your employer? A. Yes, sir, I went back to Morgan City, Louisiana. Q. Did you attempt to work after that? A. Yes, sir. Q. Were you able to work after that? A. No, sir. I worked a few days. Q. And then what happened? A. I just couldn't take it. I had to get off. Q. What hurt you? A. Well, my

back and my legs, first one leg and then the other, sometimes both legs, sort of paralyzed. I just couldn't get around. Q. Did you finally have to leave on August 19th,

1953, have to leave that employment? A. Yes, sir, 968 I left again to go back to the hospital. Q. Did you

try to get back into the hospital? A. Yes, sir. Q.

Were you able to get back into the hospital? A. No, sir.

Q. When they would not receive you in the hospital, what did you do, where did you come to? A. I went to Houston.

Q. Shortly thereafter, did you see a physician in Houston? A. Yes, sir. I saw Dr. Battalora. Q. In Houston? A. No,

sir, that was—Battalora was in New Orleans. I saw Dr. Brodsky in Houston. Q. What kind of a physician is Dr.

Brodsky, what kind of work does he do? Is he an orthopedic surgeon? A. Yes, sir, he is an orthopedic specialist

in that field. Q. All right, have you been under his care since? A. Yes, sir, I have been under his care ever since.

Q. Now, sometime in January of 1954, did you attempt to get back into the hospital or to obtain hospital treatment?

A. Yes, sir, I went back to Galveston and they told me I wasn't entitled to get back. Q. At that time, after August 19th, 1953, on until January 1954 when you went back to

the hospital, did you have any kind of attempt to work? A. Yes, sir, I tried several jobs, tried to get several jobs.

(Emphasis supplied.) We overrule point No. 1 of appellee's counter-appeal.

Appellant did not pray for cure and no award was made

to him for cure, though he testified that he had been under

the care of Dr. Brodsky ever since he went to Houston soon

after leaving appellee's employ. He did pray for maintenance and the court's judgment allowing him \$6,258.00 ex-

pressly states that it is for maintenance. We overrule point

No. 2 of appellee's counter-appeal.

The jury found that appellant will reach his maximum

recovery September 11, 1956. In our opinion it was proper

to allow maintenance to said date, though it was beyond

the date of trial. Socony-Vacuum Oil Co. v. Aderhold, 240

SW 2d 751; Stokes v. United States, 144 F. 2d 82. We over-

rule point No. 3 of appellee's counter-appeal.

969 Appellee complains because all costs in the trial

court were taxed against it. Appellant recovered a

money judgment. Therefore he is to be regarded as the

successful party, though he did not recover all that he sued for. Under the circumstances the trial court was not in error in taxing costs against the unsuccessful party. Haynes v. American Mut. Ben. Ass'n, 283 SW 199 at p. 201; Moroney Hardware Co. v. Goodwin Pottery Co., 120 SW 1088 at p. 1093; Rule 131 TRCP. We overrule point No. 4 of appellee's counter-appeal.

The judgment of the trial court is affirmed.

DIXON, Chief Justice.

Delivered March 1st, 1956.

970 IN THE COURT OF CIVIL APPEALS, FIFTH SUPREME

JUDICIAL DISTRICT, AT DALLAS, TEXAS

FROM DISTRICT COURT OF DALLAS COUNTY

No. 15050

RICHARD McALLISTER

VS.

MAGNOLIA PETROLEUM CO.

Opinion of the Court delivered by Mr. Dixon, Chief Justice.

Judgment — March 1, 1956

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is in the opinion of the Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be, in all things, affirmed; that the appellee, Magnolia Petroleum Company, do have and recover of the appellant, Richard McAllister, and of Fidelity and Deposit Company of Maryland, his surety upon appeal bond, all costs in this behalf incurred or expended, for which execution may issue; and that this decision be certified below for observance.

971 IN THE COURT OF CIVIL APPEALS, FIFTH SUPREME
JUDICIAL DISTRICT, AT DALLAS, TEXAS
(Title Omitted)

Appellant's Motion for Rehearing—Filed March 12, 1956

Richard McAllister, Appellant, respectfully moves the Court to grant him a rehearing of the above cause and upon such rehearing to set aside the judgment and opinion of March 1, 1956, affirming the judgment of the trial court denying him compensatory damages, and after such rehearing to reverse the judgment of the trial court, and in support thereof states as follows:

I.

The Honorable Court of Civil Appeals erred in holding that Appellant's cause of action for unseaworthiness is barred by the two year limitation statute of the State of Texas.

II.

The Honorable Court of Civil Appeals erred in holding that the three year statute of limitation applicable to suits for personal injuries is not applicable to a cause of action brought by a seaman complaining of unseaworthiness, i.e., defective condition of port holes and the deck above the galley, proximately causing his injuries.

III.

The Honorable Court of Civil Appeals erred in failing to hold that Congress' enactment of the Jones Act, Sec. 688 et seq., Title 46 U. S. C. A., enlarged the rights of seamen who suffer injury during the course of their employment, whether the injury be due to negligence or unseaworthiness, including the three year limitation period provided for in such act, applicable in either event.

IV.

The Honorable Court of Civil Appeals erred in failing to hold that the provisions of the Jones Act became an integral part of the General Maritime Law, and, therefore, the three year statute of limitation provided for by the Federal Employers' Liability Act, Section 51, Title 45

U. S. C. A., which is incorporated in the Jones Act by reference, controls rather than the Texas two year statute of limitation.

V.

The Honorable Court of Civil Appeals erred in failing to apply the decision of the Supreme Court of the United States in *Arizona v. Anelich*, 56 S. Ct. 707, 298 U. S. 110, wherein the Supreme Court laid down the rule that:

"The Jones Act can not be used to restrict a seaman's right but that Congressional intent was to enlarge it and to draw into the Jones Act and *make a part of such Act* the rights heretofore enjoyed by the seamen."

VI.

The Court of Civil Appeals erred in failing to hold 973 that the three year statute of limitation enacted by Congress in suits involving personal injuries sustained by seamen applies as held in *Ran vs. Atlantic Rfg. Co.*, 87 F. Supp. 853. The holding of the Honorable Court of Civil Appeals that in an action by a seaman against the shipowner for injuries sustained by him during the course of his employment because of unseaworthiness the statute of the state wherein the suit has been brought is applicable (i.e., Texas) is erroneous because such holding destroys the uniformity of the application of admiralty practice and a Congressional Statute, contrary to the decision of the United States Supreme Court in *Cox vs. Roth*, 75 S. Ct. 242, and *Garrett v. Moore-McGormack*, 317 U. S. 239, 63 S. Ct. 246.

VII.

The Honorable Court of Civil Appeals erred in failing to hold that a seaman who received injuries during the course of his employment by reason of unseaworthiness is an admiralty right which is actually embodied in the Jones Act, and, therefore, the three year statute of limitation provided for in the Jones Act applies and not the two year Texas Statute of limitation.

VIII.

The Honorable Court of Civil Appeals erred in failing to hold that in an action brought by a seaman to recover

for personal injuries by reason of unseaworthiness if any analogy to any statute of limitations must be had, then the analogy of the three year period of limitation provided for in the Jones Act must be followed rather than the Texas two year statute of limitation.

974

IX.

The Honorable Court of Civil Appeals erred in failing to hold that in a cause of action involving a maritime right the applicable doctrine of laches must be followed and not a statute of limitation. The uniform application of admiralty principles provided for in *Garrett v. Moore-McCormack*, supra, requires either the application of the three year statute of limitation provided for by Congress, or, if not, then the equitable doctrine of laches, and the evidence is undisputed that good cause existed for plaintiff's failure to file his suit prior to August, 1953, and that no prejudice resulted to appellee.

X.

The Honorable Court of Civil Appeals erred in failing to hold that the Jones Act merely added additional remedies to those that the seaman already had, and that under the Jones Act the old remedies of unseaworthiness plus the new remedies based on negligence became an integral part of the rights of seamen under the Jones Act. *Arizona v. Anelich*, 56 S.Ct. 707, 298 U.S. 110.

XI.

The Honorable Court of Civil Appeals erred in failing to hold that a seaman under the Jones Act may recover either under the count for negligence or under the count for unseaworthiness, and that the statute of limitation provided for under the Jones Act applies equally to both grounds of recovery.

XII.

The Honorable Court of Civil Appeals erred in holding that an action for unseaworthiness, not coupled with one for negligence, is not statutory in nature, 975 since the law is well settled that Congress when enacting the Jones Act incorporated in it not only a cause of action for negligence but also a cause of action for un-

seaworthiness that existed prior to the enactment of the Jones Act and became a part of said Act. *Arizona v. Anelich*, 56 S.Ct. 707, 298 U.S. 110.

XIII.

The Honorable Court of Civil Appeals erred in failing to consider and in overruling Appellant's Point Number 1, reading as follows:

"The Court erred in submitting to the jury Special Issues Numbers 3 and 14 respectively, because (A) such issues submitted a question of law to the jury rather than the pleaded and proven issues, i.e., whether or not such portholes or windows (Requested Issue 3) or whether the deck above the galley (Requested Issue 14) not being watertight, proximately caused Appellant's injuries, and (B) because such issues placed a greater burden upon Appellant than is required by law."

XIV.

The Honorable Court of Civil Appeals erred in failing to consider and in overruling Appellant's Point Number 2, reading as follows:

"The Court erred in submitting the definition of unseaworthiness to the jury in connection with the submission of Special Issues Numbers 3 and 14, respectively, because such definition required the jury to find the vessel as a whole unseaworthy before they could answer Special Issues Numbers 3 and 14 respectively in the affirmative rather than limiting the unseaworthiness to the windows or portholes on the port side of the M/V J. C. STEPHENS, or the deck above the galley."

The Honorable Court of Civil Appeals erred in failing to consider and in overruling Appellant's Point Number 3, reading as follows:

"Seamen members of a crew have an express or implied warranty from the shipowner that their vessel, equipment, appliances and gear, are in seaworthy condition. The breach of such warranty proximately caus-

ing injuries makes such shipowner liable for damages. Special Issues Numbers 3 and 14 respectively asked the jury to resolve a question of law in contravention to Rule 272, Texas Rules of Civil Procedure."

XVI.

The Honorable Court of Civil Appeals erred in failing to consider and in overruling Appellant's Point Number 4, reading as follows:

"The Court's instructions not to answer Special Issues Numbers 4 and 15 unless they answered Issues 3 and 14 in the affirmative constitutes a denial of due process under the Fifth Amendment of the Federal Constitution, a denial of Appellant's rights under the Seventh Amendment of the Federal Constitution; and a denial of Appellant's right under Article 1, Section 15, and Article V, Section 10 of the Constitution of the State of Texas to right of trial by jury on one of the pivotal elements of his cause of action."

XVII.

The Honorable Court of Civil Appeals erred in failing to consider and in overruling Appellant's Point Five, reading as follows:

"The Court erred in refusing to answer the jury's question inquiring whether by the term 'unseaworthy,' as inquired about in Special Issue Number Three, the Court referred to the vessel as a whole or to the three windows on the port side."

977

XVIII.

The Honorable Court of Civil Appeals erred in failing to consider and in overruling Appellant's Point Six as follows:

"The Court erred in refusing to make answer to the jury's question as requested by Appellant reading as follows: 'In reply to your question, you are instructed that the term 'unseaworthy' as given to you in connection with Special Issue 3, refers to the three windows on the port side.'

XIX.

The Honorable Court of Civil Appeals erred in failing to consider and in overruling Appellant's Point Seven reading as follows:

"The Court erred in failing to answer the jury's question by submitting a corrected definition of 'unseaworthy' in connection with Special Issue Number Three as requested by Appellant reading as follows: 'You are instructed that the term 'unseaworthy', as used herein, is meant that the portholes and their fittings are not fit for the purpose for which said portholes were used.'

XX.

The Honorable Court of Civil Appeals erred in failing to consider and in overruling Appellant's Point Eight reading as follows:

"There being evidence that Appellant was discharged from the Marine Hospital without being given any further medical treatment and that he was in need of further treatment, including operation and hospitalization, the shipowner owed Appellant the cost of such operation, hospitalization and medical care. The Court's refusal to include in the damage issue the reasonable expense of operation, hospitalization and medical expense from the date of trial and in the future was error."

XXI.

The Honorable Court of Civil Appeals erred in failing to consider and in overruling Appellant's Point Nine, reading as follows:

"The Court committed error when it failed to include in the damage issue, as an element of damages sustained by Appellant, the loss of the reasonable cost of food and lodging which Appellant was entitled to receive in addition to moneys paid him as wages."

XXII.

The Honorable Court of Civil Appeals erred in failing to consider and in overruling Appellant's Point Ten, reading as follows:

"The testimony of Appellee's expert witnesses, Barkley and Vandever, was inadmissible because the tests they made and upon which they predicated their testimony, were not made under the same conditions that existed at the time when Appellant slipped on the wet steps and injured himself. The Court's failure to sustain Appellant's objection to such testimony and upon its being admitted over Appellant's objection, the Court's failure to sustain Appellant's motion to strike such testimony from the record constituted prejudicial error."

XXIII.

The Honorable Court of Civil Appeals erred in failing to consider and in overruling Appellant's complaint of the trial court's failure to submit requested Special Issue No. 3 (Tr. 38) reading as follows:

"If you have answered the preceding Special Issue (No. 2), 'They were not', then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 3

Do you find from a preponderance of the evidence that the portholes or windows over and near the galley stairs leading to and from the lounge of the crew ship in question, not being in a watertight condition, if you have so found, was a proximate cause of the injuries, if any, sustained by the plaintiff, Richard McAllister, at the time and on the occasion in question?

979

Answer 'Yes' or 'No'."

XXIV.

The Honorable Court of Civil Appeals erred in failing to consider and in overruling Appellant's complaint of the trial court's refusal to submit requested Special Issue No. 14 (Tr. p. 14), reading as follows:

"If you have answered the preceding Special Issue (No. 13) 'It was not', then you will answer the following special issue; otherwise, you will not answer it.

SPECIAL ISSUE No. 14.

Do you find from a preponderance of the evidence that the deck above the galley not being watertight, if you have so found, was a proximate cause of the injuries, if any, sustained by the plaintiff Richard McAllister at the time and on the occasion in question?

Answer 'Yes', or 'No'.

XXV.

The Honorable Court of Civil Appeals erred in failing to consider and in overruling Appellant's complaint of the trial court's submission of its special issue No. 14 and definition, reading as follows:

"If you have answered the preceding special Issue (13) 'It was not', then you will answer the following special issue; otherwise, you will not answer it.

SPECIAL ISSUE No. 14.

Do you find from a preponderance of the evidence that the deck above the galley not being watertight, if you have so found in answer to special issue No. 13, made the *crew ship* in question 'unseaworthy', as defined herein?

You are instructed that the term 'unseaworthy', as used herein, means that a vessel with its appliances and fittings is not reasonably fit for the purpose for which *it* is being used.

WHEREFORE, PREMISES CONSIDERED, petitioner respectfully prays that this Court grant him a rehearing and upon rehearing the judgment of the trial court be reversed and the cause remanded for a new trial on his cause of action for compensatory damages.

Respectfully submitted,

MANDELL & WRIGHT,

By ARTHUR J. MANDELL,

Attorneys for Appellant,

200 Republic Building,

Houston 2, Texas.

Copy of the foregoing motion for rehearing has been this
the 10th day of March, 1956; mailed to Appellee's attorneys,
Messrs. Frank C. Bolton, Jr., Earl A. Brown, and Charles
B. Walla  , P. O. Box 900, Dallas, Texas.

ARTHUR J. MANDELL

980a

(File Endorsement Omitted)

981 IN THE COURT OF CIVIL APPEALS, FIFTH SUPREME
JUDICIAL DISTRICT, AT DALLAS.

Order Overruling Appellant's Motion for Rehearing—March 30th,
1956

(Title Omitted)

Friday,

This day came on to be heard the motion of appellant
for rehearing of this cause, and the same being inspected,
it is considered, adjudged and ordered that the motion be
overruled.

Written opinion by Mr. Dixon, Chief Justice.

982 IN THE COURT OF CIVIL APPEALS, FIFTH SUPREME
JUDICIAL DISTRICT, AT DALLAS, TEXAS

No. 15,050

RICHARD McALLISTER,

Appellant,

MAGNOLIA PETROLEUM CO.,

Appellee

Opinion on Rehearing — March 30, 1956

On rehearing, appellant says our decision in this case
is contrary to the holdings in Arizona v. Anelich, 56 S. Ct.
707, 298 U.S. 140; Ran v. Atlantic Ref. Co., 87 F. Supp.
853; Cox v. Roth, 75 S. Ct. 242; Garrett v. Moore-McCor-
mack, 63 S. Ct. 246, 317 U.S. 239. We have read each of

the cited cases. Each of them was concerned with a cause of action involving negligence, hence the Jones Act was applicable. None of them was concerned, as is this appeal, with an action based on unseaworthiness not involving negligence, to which type of action we hold the Jones Act is not applicable.

Appellant says in effect that Arizona v. Anelich, *supra*, is authority for holding that the general maritime law is drawn into and made a part of the Jones Act; consequently the provisions of the Jones Act, including the three-year limitations period, are applicable to all causes arising under the general maritime law. We do not so interpret the Arizona case. The opinion in the Arizona case holds that the Jones Act has become a part of the general maritime law. It does not follow that all cases arising under general maritime law are therefore to be governed by the provisions of the Jones Act, for of course a part cannot be said to include and cover the whole.

The motion for rehearing is overruled.

DIXON, *Chief Justice*

Delivered March 30, 1956.

983

(File Endorsement Omitted)

	Page
STATEMENT OF THE CASE	441
STATEMENT OF JURISDICTION	441
POINTS OF ERROR	442
POINT ONE	442
Statement	442
Argument and Authorities	444
POINT TWO	452
Statement, Argument and Authorities	452
POINTS THREE AND FOUR	453
Statement	454
Argument and Authorities	463
POINT FIVE	471
Argument and Authorities	472
POINT SIX	475
Argument and Authorities	475
POINTS SEVEN AND EIGHT	477
Argument and Authorities	477
POINT NINE	479
Argument and Authorities	480
CONCLUSION	481

LIST OF AUTHORITIES.

CASES

Alaska Steamship Co. v. Petterson, 205 F. 2d 478, 347 U.S. 396, 74 S. Ct. 601	455, 456, 466, 472
Arizona v. Anelich, 56 S. Ct. 707, 298 U.S. 110, 80 L. Ed. 1075	447, 455
Armit v. Loveland, 115 F. 2d 308	455
Balado v. Lykes Bros. Steamship Co., 179 F. 2d 943	456, 478
Baltimore Steamship Co. v. Phillips, 274 U.S. 316, 47 S. Ct. 600, 71 L. Ed. 1069	441, 442, 445
Beadle v. Spencer, 298 U.S. 124, 56 S. Ct. 712, 80 L. Ed. 1082	447, 455
Bentley v. Albatross S.S. Co., 203 F. 2d 270	464
Berti v. Compagnie De Navigation Syprien Fabre (2nd Cir.), 213 F. 2d 397	456
Bonham Coca Cola Bottling Co. v. Jennings, 181 S.W. 2d, p. 97, Judgment correct; Writ dismissed	474

	Page
Boudoin v. Lykes Bros. Steamship Co., Inc., 112 F. Supp. 177, 211 F. 2d 618, 75 S. Ct. 382	456, 457
Cappella v. Lykes Bros. S.S. Co., Inc., 174 F. 2d 794, Cert. Den. 70 S. Ct. 102, 338 U.S. 859, 94 L. Ed. 526	456
Central Vermont R. Co. v. White, 35 S. Ct. 865, 238 U.S. 507	450
Chelentis v. Luckenbach S.S. Co., 38 S. Ct. 501, 247 U.S. 372	450
Consolidated Underwriters v. Vargas, 113 S.W. 2d 922	474
Cox v. Roth, 75 S. Ct. 242, 244, 348 U.S. 207	445, 452
Crawford v. Pope & Talbot, 206 F. 2d 784	464
Daniels v. Pacific Atlantic S.S. Co., 268 F. 15, 120 F. Supp. 96	473
Dixon v. United States, 120 F. Supp. 747	464, 472
Engel v. Davenport, 46 S. Ct. 410, 271 U.S. 33, 70 L. Ed. 813	445
Firemen's Mutual Insurance Co. v. Aponaug Mfg. Co., Inc., 149 F. 2d 359	477
Garrett v. Moore-McCormack Co., Inc., 63 S. Ct. 246, 317 U.S. 239, 87 L. Ed. 239	448, 449, 450, 451, 452, 453, 469
Garza v. San Antonio Transit Co., 180 S.W. 2d 1006, writ ref., w.m.	481
German v. Carnegie-Illinois Corp., 156 F. 2d 977, cert. den.	451
Inter-Ocean Steamship Co. v. Topolofsky, 165 F. 2d 308	455
Jacob Decker & Sons v. Cappa (S. Ct.), 164 S.W. 2d 828	473
John F. LieGate v. The Panamolga, 221 F. 2d 689	472
Jones v. Winter, 215 S.W. 2d 654, W.E.R.-N.R.E.	474
Keen v. Overseas Tankship Corp., 194 F. 2d 515, cert. den., 72 S. Ct. 1061, 343 U.S. 966, 96 L. Ed. 1363	464
Lauro v. United States, 162 F. 2d 32	464
Loverich v. Warner (3d Cir.), 118 F. 2d 690, 693	452
Mähnich v. Southern Steamship Co., 64 S. Ct. 55, 321 U.S. 96, 88 L. Ed. 561	455, 464
McCarthy v. American-Eastern Corp., 175 F. 2d 724, cert. den. 338 U.S. 939, 70 S. Ct. 144	451
McDaniel v. Gulf and South American S.S. Co., dec. Dec. 21, 1955, 228 F. 2d 189	452
Mullen v. Fitz Simons & Connell Dredge & Dock Co., 172 F. 2d 601	451
Norris Bros. v. Mattison, 145 S.W. 2d 204	481
Panama R. Co. v. Johnson, 44 S. Ct. 391, 264 U.S. 375	446, 450
Pope & Talbot, Inc. v. Hawn, 198 F. 2d 800, affirmed 346 U.S. 406, 74 S. Ct. 202	455, 456, 464, 466, 468, 470, 472, 479
Ran v. Atlantic Refining Co., 87 F. Supp. 853	446
Robert Henderson v. Cargill, Inc., 1954 AMC, p. 2136	452
Rogers v. United States Lines (3rd Cir.), 205 F. 2d 57, 347 U.S. 984, 74 S. Ct. 849	455

	Page
Roosth & Genecov Production Co. v. White (S. Ct. Texas), 262 S.W. 2d 99	474
Seas Shipping Co. v. Sieracki, 149 F. 2d 98, 328 U.S. 85, 66 S. Ct. 872	455, 464, 468, 472
Sellon v. Great Lakes Transit Corp. (2d Cir.), 87 F. 2d 708	464
Socony-Vacuum Oil Company v. Smith, 59 S. Ct. 262, 305 U.S. 424	455
Southern Pacific Company v. Jensen, 37 S. Ct. 524, 244 U.S. 205	450
Strika v. Holland America Line, 90 F. Supp. 524	456, 470, 471
Texas General Indemnity Co. v. Wm. Scott (S. Ct. of Texas), 253 S.W. 2d 651, p. 654	474
The Arizona, 298 U.S. 110, 123, 56 S. Ct. 707, 711, 80 L.Ed. 1075	450
The H. A. Scandrett (Sellen v. Great Lakes Transit Corporation) (CCA 2nd Cir.), 87 F. 2d 708	456
The Osceola, 189 U.S. 158, 23 S. Ct. 384, 27 L.Ed. 860	455, 469, 472
The Seeandbee (CCA 6th Cir.), 102 F. 2d 577	456, 464
Tompkins v. Erie Ry. Co. (C.C.A. 2d), 98 F. 2d 49	477
United States v. Alex Dussel Iron Works, Inc., 31 F. 2d 535 (5th Cir.)	452
United States v. Smith, 220 F. 2d 548	464
Walker v. Great Atlantic & Pacific Tea Co. (Tex. Sup.), 112 S.W. 170	473
Warner v. Goltra, 293 U.S. 155, 156, 162, 55 S. Ct. 46, 49, 79 L.Ed. 254	450
Wilkerson v. McCarthy, 69 S. Ct. 313, 336 U.S. 53	476

CONSTITUTION OF THE STATE OF TEXAS

Article I, Section 15	475, 476
Article V, Section 10	475, 476

REVISED CIVIL STATUTES OF TEXAS

Article 1728, Subdiv. 2	441
-------------------------	-----

RULES OF CIVIL PROCEDURE

Rule 272	472, 474
----------	----------

UNITED STATES STATUTES

45 U.S.C.A. 56	441, 444, 445
46 U.S.C.A. 688	441, 442, 444, 445, 448

TEXTS

Speer's Law of Special Issues of Texas, page 47	474
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IN THE SUPREME COURT OF TEXAS

RICHARD McALLISTER, Petitioner

v.

MAGNOLIA PETROLEUM COMPANY, Respondent

Application for Writ of Error—Filed May 3, 1956

To The Honorable Supreme Court
of The State of Texas:

STATEMENT OF THE CASE

This is a suit under Section 688, Title 46 U.S.C.A., brought by Richard McAllister, a seaman, for personal injuries sustained aboard Respondent's vessel. As a cause of action for damages, the petition alleged negligence and unseaworthiness and for maintenance. The suit is for damages in excess of One Thousand Dollars (\$1,000.00). The opinion of the Court of Civil Appeals correctly states the result of the suit, but misconceives the nature of the suit, and is in error in its statement concerning the applicable law. The Court of Civil Appeals held the Texas two-year limitation statute applicable to such cause of action instead of the three-year statute provided for by Congress. Section 56, Title 46 U.S.C.A.

The petitioner for Writ of Error is Richard McAllister, plaintiff in the district court and appellant in the Court of Civil Appeals.

STATEMENT OF JURISDICTION

The Court has jurisdiction of this suit under subdivision 2 of Article 1728, in that the decision of the Court of Civil Appeals conflicts with the decision of the Supreme Court of the United States in *Baltimore Steamship Co. v. Phillips*, 274 U.S. 316; 47 S. Ct. 600; 7 A. L. Ed. 1069. In the present case the Court of Civil Appeals holds that a cause of action for unseaworthiness is separate, distinct and severable, holding that a seaman suing his employer for personal injuries caused by unseaworthiness must do so within the Texas two-year limitation statute applicable to suits for personal injuries instead of the three-year limitation statute enacted by Congress. Section 56, Title 46 U.S.C.A., incorporated by reference in Section 688, Title 46 U.S.C.A.

The Supreme Court has jurisdiction of this suit under Subdivision 6, Article 1728, in that the Honorable Court of Civil Appeals committed an error of substantive law which affects the judgment rendered here, that court having held, directly contrary to the decision of the Supreme Court of the United States in *Baltimore Steamship Co. v. Phillips*, supra, that a seaman's cause of action for unseaworthiness being severable, separate and distinct from a cause of action for negligence such action must be brought within the two-year Texas limitation statute.

989.

POINTS OF ERROR

POINT ONE

(Germane to Points in Motion for Rehearing 1, 2, 3, 4, 5,
6, 7, 8, 9, 10, 11, 12)

A seaman suffering personal injuries in the course of his employment, whether by reason of unseaworthiness of the vessel, or its appliances, or negligence, is a single and indivisible cause of action and may be brought within the three year limitation provision of the Jones Act. (Section 688, Title 46 U.S.C.A.)

STATEMENT UNDER POINT ONE

Petitioner filed suit for personal injuries sustained while a seaman aboard the SS J. C. STEPHENS against the vessel's owner, Magnolia Petroleum Company, while said vessel was upon navigable waters of the United States, alleging specific acts of negligence and unseaworthiness of the portholes over the stairs leading from the lounge to the galley, and the deck above the galley, conditions which allowed water to come in through said portholes and through said deck on the stairs, which caused plaintiff to fall and sustain serious injuries.

The jury found that plaintiff received an injury to his body while attempting to walk down the stairs leading from the lounge to the galley (Issue No. 1) and that the portholes over the stairs (Issue No. 2), as well as the deck above the galley (Issue No. 13) were not watertight. As a matter of law these specific findings constitute unseaworthiness of such portholes and of said deck.

Over timely objections by Petitioner's counsel, the Court improperly submitted Special Issues Numbers 3 and 990 14, which asked the jury to find legal conclusions as to whether or not these conditions (lack of watertight portholes and a watertight deck) made "the crewship in question unseaworthy as defined herein". In connection with each issue (3 and 14), the Court instructed the jury that to constitute unseaworthiness these conditions each separately must render the "vessel not reasonably fit for the purposes for which it is being used". (All Emphasis ours)

In addition to being the submission of a question of law, the effect of Special Issues Numbers 3 and 14 was to place the burden upon Petitioner of proving that the lack of watertight portholes and deck made the ship unfit to navigate upon the Gulf of Mexico or other navigable waters where the vessel was at the time of Petitioner's injuries. Since the vessel was admittedly being used to carry Respondent's workmen to and from drilling location of the Gulf of Mexico, notwithstanding these defects, the jury could hardly do otherwise than find these issues in the negative, i.e., against Petitioner. So unreasonable and improper was such inquiry, that the jury, in an obvious effort to understand why such a question should be asked, requested the Court to clarify the issue by making this inquiry:

"Judge Long: In Special Issue No. 3 is the term 'unseaworthy' referring to the vessel *as a whole*, or the three windows on the port side?"

The Court refused to reply to the jury's question saying (S.F. p. 18) "The Court's charge contains definitions and instructions. The Court can instruct you no further." In the face of the Court's instructions and its subsequent failure to answer the jurors' question, in order to answer Issues 3 and 14 affirmatively, they had to believe that these 991 conditions inquired about in Issues Numbers 2 and 13 rendered the vessel *as a whole* unfit for the use to which she was then being put. Since no contention nor proof was made that the vessel was unfit to navigate by reason of the leaking portholes and deck above the galley, the jury had no alternative but to answer Special Issues Numbers 3 and 14 in the negative. Since the issues of

proximate cause (4 and 15) were conditioned upon an affirmative answer to Special Issues 3 and 14, such issues were not answered.

On damages the jury found for plaintiff in the sum of Thirty-two Thousand Five Hundred Dollars (\$32,500.00).

The jury absolved the defendant of negligence, and the Court entered judgment for the defendant denying compensatory damages. From this judgment the plaintiff took an appeal to the Court of Civil Appeals.

The Court of Civil Appeals affirmed the judgment of the trial court without considering any of the errors assigned by Petitioners, by sustaining a plea of limitation and laches filed by the Respondent and overruled by the trial court, the Court of Civil Appeals holding that as to the cause of action based on unseaworthiness the two-year Texas limitation statute was applicable.

ARGUMENT AND AUTHORITIES UNDER POINT ONE

The Honorable Court of Civil Appeals misconceived the broad principles of the Jones Act—not only as written but as interpreted by the many decisions of the Supreme Court of the United States. The Act read as follows; (Section 688, Title 46 U.S.C.A.):

“Any seaman who shall suffer personal injury in the course of his employment may, at his election, 992 maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . .”

Section 56, Title 45 U.S.C.A. (Railway Employees' Act) reads as follows:

“No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.” (1939 Amendment)

At the outset it must be stated that since the passage of the Jones Act there is no decision in the books which holds that a seaman, injured during the course of his employment, whether through negligence or unseaworthiness, must file his suit within the period of the limitation statute of

the state wherein the cause of action is brought. On the contrary, all the decisions hold the benefits conferred on Seamen under the Jones Act are equally applicable to the pre-existing causes of action under the General Maritime Law, just like the benefits a seaman had under the Maritime Law, became a part of the provisions of the Jones Act. So intermingled are these rights that the failure to assert one in a cause of action for personal injuries forever bars the seaman from presenting it in a separate or subsequent cause of action. *Baltimore Steamship Company v. Phillips*, supra. Indeed, the very language of Section 688 clearly indicates such intention since said Section does not deal only with rights but also with *remedies*, thus:

993.

"Any seaman who suffers personal injuries in the course of his employment, etc", and "...in such action all statutes of the United States modifying or extending the common-law right *or remedy* in cases of personal injury to railway employees shall apply."

Thus, the *remedy* which includes the three-year statute of limitation becomes a substantive part of a seaman's cause of action (a ward of the Admiralty in whose behalf remedial legislation was passed) and must be liberally construed. See *Cox v. Roth*, 75 S. Ct. 242, 244, 348 U.S. 207.

The only case brought by a seaman in which the precise question here was ever raised or discussed is *Engel v. Davenport*, 46 S. Ct. 410, 271 U.S. 33, 70 L. Ed. 813. Engel, a seaman, brought an action at law against the shipowner to recover damages for personal injuries suffered aboard a vessel in April, 1921. The suit was brought within the then existing two-year period of limitation prescribed by the Jones Act. Davenport demurred to the complaint on the ground that the cause of action was barred by the California one year limitation statute, which the trial court sustained. The Supreme Court of California affirmed, 220 Pac. p. 710. Engel brought certiorari contending that the suit,—founded as it was on Section 33 of the Merchant Marine Act (Section 688, Title 46) in which the state courts have concurrent jurisdiction insisting that Section 56 of Title 45 incorporated in the provisions of the Merchant Marine Act—can be commenced within the then existing two-year limitation statute, irrespective of state statutes.

The Supreme Court of the United States reversed the California court, stating as follows:

"It is settled by the decision in *Panama Railroad v. Johnson*, 44 S. Ct. 391, 264 U. S. 375, 68 L. Ed 748, that section 33 of the Merchant Marine Act is an exercise of the power of Congress to alter or supplement the maritime law, by changes that are country-wide and uniform in operation; that it brings into the maritime law new rules drawn from the Employers' Liability Act and its amendments—adopted by the generic reference to 'all statutes of the United States modifying or extending the common law right or remedy in cases of personal injuries to railway employees' and 'extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules'; . . . 'The present suit is not brought merely to enforce the liability of the owner of the vessel to indemnity for injuries caused by a defective appliance, without regard to negligence, for which an action of law could have been maintained prior to the Merchant Marine Act, *Carlisle Packing Co. v. Sandanger*, 42 S. Ct. 475, 259 U.S. 255, 66 L. Ed. 927; and we need not determine whether if it had been thus brought under the old rules, the state statute of limitations would have been applicable.'

Thus, we see that the Supreme Court of the United States left this specific question open, and there are no decisions holding that seamen suing their employers for personal injuries caused by unseaworthiness must do so within the limitation period of the state wherein the cause of action is brought. True, there are a number of cases holding that Longshoremen bringing a third party action against a ship-owner for unseaworthiness and/or negligence must do so within the limitation period of the state wherein the cause of action is brought, but there the necessary elements of employer-employee relationship required by Section 688 is absent. Therefore, cases in which Longshoremen are involved are not helpful, nor applicable.

In *Ran v. Atlantic Refining Co.*, 87 F. Supp. 1853, the Court held that a cause of action for personal in-

995 juries by reason of unseaworthiness may be brought within three years, stating as follows:

"A breach of the duty to provide a seaworthy vessel manned by a competent crew occurs when a seaman is injured as a result of unseaworthiness or negligence. In the instant case the plaintiff's right to damages for personal injuries suffered from this breach of this duty arose in July or August of 1944 but was extinguished forever in July or August of 1947."

While the Supreme Court, prior to the decision in the case at bar has not squarely passed on this question of limitation, there are numerous decisions holding that the Jones Act can not be used to restrict seaman's rights but that Congressional intent was to enlarge it and draw into the Act, and make part of such Act the rights heretofore enjoyed by the seaman. See *Arizona v. Anelich*, 56 S. Ct. 707, 298 U.S. 110, 89 L. Ed. 1075, and *Beadle v. Spencer*, 56 S. Ct. 712, 298 U.S. 124, 80 L. Ed. 1082.

In the *Arizona v. Anelich* case, the employer shipowner contended that a seaman suing under the Jones Act, incorporating as it does the Federal Employers' Liability Act, the employer (prior to the 1939 amendment abolishing the defense of assumption of risk) may impose the defense of assumption of risk in a suit brought to recover for personal injuries. The employer's contention being that since the Jones Act does not specifically abolish the defense of assumption of risk, even though under the General Maritime Law it is not a defense, a seaman who chooses to proceed under the Jones Act, like any other litigant under the Federal Employers' Liability Act, subjects himself to the employer's defense of assumption of risk. The Supreme 996 Court rejected such contention on the ground that the rights and remedies which a seaman has under the old Admiralty Rules are enlarged and become a part of these new rules of the Jones Act and become an integral part of the Act, stating as follows:

"Like considerations, and others to be mentioned, require a like conclusion with respect to the modified and in some respects enlarged liability imported unto the maritime law by the Jones Act. The legislation was remedial, for the benefit and protection of seamen.

who are peculiarly the wards of admiralty. Its purpose was to enlarge the protection, not to narrow it. Cf. *Chelentis v. Luckenbach S.S. Co.*, supra. Its provisions, like others of the Merchant Marine Act (41 Stat. 988), of which it is a part, are to be liberally construed to attain that end. See *Cortes vs. Baltimore Insular Line*, 287 U.S. 367, * * * and are to be interpreted in harmony with the established doctrine of maritime law of which it is an integral part."

To hold seamen may bring a cause of action grounded in negligence within three years under a Federal statute but one grounded on unseaworthiness must be brought under the state statute, which in Texas is two years, would destroy the uniformity of the application of the Maritime Law and destroy the remedy specifically provided for by Congress in enacting Section 688, Title 46, supra. See *Garrett v. Moore-McCormack Co., Inc.*, 63 S. Ct. 246, 317 U.S. 239, 87 L. Ed. 239, which holds that when procedural matters tend to negate or destroy a federally created right such procedure will not be followed to accomplish such results, stating as follows: (p. 249)

"We do not have in this case an effort of the state court to enforce rights claimed to be rooted in state law. The petitioner's suit rested on asserted rights granted by federal law and the state courts so treated it. Jurisdiction of the state court to try this case rests solely upon Sec. 33 of the Jones Act and upon statutes traceable to the Judiciary Act of 1789 which in 'all civil causes of admiralty and maritime jurisdiction' saves to suitors 'the right of common law remedy where the common law is competent to give it.' These statutes authorize Pennsylvania courts to try cases coming within the defined category. Whether Pennsylvania was required by the acts to make its courts available for those federal remedies, or whether it could create its own remedy as to maintenance and cure based on local law, we need not decide; for having voluntarily opened its courts to petitioner, the questions are whether Pennsylvania was thereupon required to give to petitioner the full benefit of federal law and if so whether it failed to afford that benefit.

"There is no dearth of example of the obligation on law courts which attempt to enforce substantive rights arising from admiralty law to do so in a manner conforming to admiralty practice. Contributory negligence is not a barrier to a proceeding in admiralty or under the Jones Act, and the state courts are required to apply this rule in Jones Act actions. * * *

"It must be remembered that the state courts have concurrent jurisdiction with the federal courts to try actions either under the Merchant Marine Act or in personam such as maintenance and cure. The source of the governing law applied is *in the national*, not the state, governments. IF BY ITS PRACTICE THE STATE COURT WERE PERMITTED SUBSTANTIALLY TO ALTER THE RIGHTS OF EITHER LITIGANT, AS THOSE RIGHTS WERE ESTABLISHED IN FEDERAL LAW, THE REMEDY AFFORDED BY THE STATE WOULD NOT EN-

FORCE, BUT WOULD ACTUALLY DENY, 998 FEDERAL RIGHTS WHICH CONGRESS, BY PROVIDING ALTERNATIVE REMEDIES, INTENDED TO MAKE NOT LESS, BUT MORE SECURE. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. * * *

"And admiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State. So here, in trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected."

In the *Garrett* case, *supra*, the defendant Moore-McCormack Co., introduced in evidence an instrument signed by Garrett releasing all claims in the very cause of action sued upon. Garrett neither by pleading nor proof sought to overcome the effect of such release. The Court granted an instructed verdict because under Pennsylvania practice, like Texas, the burden was on the plaintiff to overcome the consequences of his release. Strictly a procedural matter,

yet, the Supreme Court of the United States reversed the Pennsylvania Court holding that by such procedural matter substantive rights of the seaman have been denied him and further holding that in conformity with federal procedure applicable to such cases the burden was upon the person who interposes the defense of a release to prove that it was fairly entered into.

Moreover, in the very same case, and in many cases prior to and since the *Garrett* case, the Supreme Court has held that the rights of a seaman, whether under the old maritime rules or under the new are to be liberally construed 999 to carry out its full purpose, which was to enlarge admiralty's protection to its wards. *Warner v. Goltra*, 293 U.S. 155, 156, 162, 55 S. Ct. 46, 49, 79 L. Ed. 254; *The Arizona*, 298 U.S. 110, 123, 56 S. Ct. 707, 711, 80 L. Ed. 1075.

Other cases in which the Court has held that states' procedural matters can not be used to negate or destroy a federally created right are:

Central Vermont R. Co. v. White, 35 S. Ct. 865, 238 U.S. 507;

Southern Pacific Company v. Jensen, 37 S. Ct. 524, 244 U.S. 205;

Chelentis v. Luckenbach S.S. Co., 38 S. Ct. 501, 247 U.S. 372;

Panama R. Co. v. Johnson, 44 S. Ct. 391, 264 U.S. 375.

In *Panama R. Co. v. Johnson*, supra, the Supreme Court stated as follows:

"After the decision (*Chelentis v. Luckenbach*) the section was re-enacted in the amended form hereinbefore set forth as part of an act the expressed object of which was 'to provide for the promotion and maintenance of the American merchant marine.' In that form it makes applicable to personal injuries suffered by seamen in the course of their employment 'all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees.' Thus its origin, environment and subject matter show that it is intended to, and does, bring the rules to which it refers into the maritime law."

“A more reasonable view consistent with the spirit and the purpose of the statute as a whole, is that the words are used in the sense of ‘an action to recover damages for such injuries,’ the emphasis being on the object of the suit rather than the jurisdiction in which it is brought.”

The law is settled, and the Honorable Court of Civil Appeals so held, that a cause of action for negligence may be joined in a cause of action for unseaworthiness. See

- McCarthy v. American-Eastern Corp., 175 F. 2d 724, cert. den. 338 U.S. 939, 70 S. Ct. 144;
Mullen v. Fitz Simons & Connell Dredge & Dock Co., 172 F. 2d 601;
German v. Carnegie-Illinois Steel Corp., 156 F. 2d 977, cert. den.

In the *McCarthy* case, supra, the Court stated as follows:

“Prior to the passage of the Jones Act; unless there was diversity of citizenship a seaman was compelled in the federal court to assert his cause of action for injuries in a suit in admiralty in which there was no jury trial. It was the purpose of the ‘election’ clause of the Jones Act, we think, to make certain that an injured seaman, instead of suing in admiralty, could at his option assert his cause of action for personal injuries in the federal court in an action of law regardless of diversity of citizenship, thereby obtaining the right to a jury trial in every case in which the injuries were serious enough to bring the claim within the jurisdictional amount of \$3000.00. * * * ”

The opinion of the Honorable Court of Civil Appeals in effect restricts these rights by applying the shorter period of the state statute of limitations instead of following the three year statute enacted by Congress. Such decision destroys the uniformity of the application of the maritime law, contrary to *Garrett v. Moore-McCormack Co.*, supra.

(Germane to Points in Motion for Rehearing 1, 2, 3, 4, 5, 6,
7, 8, 9, 10, 11 and 12)

Congress having enacted a three year period of limitation within which a seaman may institute a cause of action for personal injuries, if any analogy is to be made, the three year period of limitation provided for in the Jones Act must be followed. (Title 45, Section 56, U.S.C.A., incorporated by reference in the Jones Act).

STATEMENT UNDER POINT NUMBER TWO

The Court of Civil Appeals sustained Respondent's plea of limitation. In reply to Respondent's plea of laches Petitioner filed an answer denying laches and limitations. If laches is the controlling proposition of law applicable in such a case, see *Robert Henderson v. Cargill, Inc.*, 1954 AMC, p. 2136; *Garrett v. Moore-McCormack*, 63 S^t Ct. 246, 317 U.S. 239, 97 L. Ed. 239, then we respectfully submit that the evidence in this case without contradiction and undisputedly overcomes the plea of laches. See the testimony of Superintendent Rhodes (S.F. p. 591) where it is undisputedly proven that all the witnesses and members of the crew were not only still employees of the Respondent but were also brought into court and testified. The doctrine of laches consists of inexcusable delay plus prejudice to the adverse party resulting from the delay. *Loverick v. Warner* (3rd Cir.), 118 F. 2d 690, 693.

"If the libellant can overcome the presumption of prejudice, he will have overcome the defense of laches."

See *United States v. Alex Dussel Iron Works, Inc.*, 31 F. 2d 535 (5th Cir.);

McDaniel v. Gulf and South American Steamship Co., decided December 21, 1955, 228 F. 2d 189.

1002 In *Cox v. Roth*, supra, the Court said:

"Resort to the policy of a law may be had to ameliorate its seeming harshness or qualify its apparent absolutes *** The process of interpretation also misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve."

From the foregoing, it is clear that Congress by enacting the Merchant Marine Act meant that those contingencies against which it provided to insure recovery to railroad employees should also be met in the admiralty setting, including the three-year limitation period, a substantive federal right. (*Garrett v. Moore-McCormack*, *supra*). It is without question that the right to recover for unseaworthiness is an admiralty right, therefore, the application of the Texas two-year limitation statute would do violence to the uniform application of maritime rights and remedies and express Congressional intent.

POINT NUMBER THREE

(Germane to Point No. XIII in Motion for Rehearing)

The Court of Civil Appeals erroneously failed to consider Petitioner's Point Number One (Court of Civil Appeals) as follows: The Court erred in submitting to the jury Special Issues Numbers Three and Fourteen respectively because such issues as submitted asked the jury to resolve a question of law and imposed a greater burden on Petitioner than required by law instead of inquiring whether or not such portholes, or windows, (Requested Issue No. Three) or whether the deck above the galley (Requested Issue No. Fourteen) not being watertight proximately caused Petitioner's injuries.

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POINT NUMBER FOUR

(Germane to Points in Motion for Rehearing 13 and 14)

The Court of Civil Appeals erred in failing to consider and overruling Petitioner's Point Number Two (Court of Civil Appeals) reading as follows: The Court erred in submitting the definition of unseaworthiness to the jury in connection with the submission of Special Issues Numbers Three and Fourteen respectively because such definition required the jury to find the vessel *as a whole* unseaworthy before they could answer Special Issues Numbers Three and Fourteen in the affirmative rather than limiting the unseaworthiness to the windows, or portholes on the port side of the M/V J. C. Stephens, or the deck above the galley.

STATEMENT UNDER POINTS THREE AND FOUR

As heretofore stated Petitioner sued Respondent for personal injuries sustained while a member of the crew of the M/V J. C. STEPHENS by reason of negligence and unseaworthiness. Under the unseaworthiness count Petitioner's complaints in the Court of Civil Appeals and here are as follows:

(1) Issues Numbers 3 and 14 submitted to the jury a question of law rather than an ultimate question of fact.

(2) The Court's erroneous definition of "unseaworthy" submitted to the jury in connection with issues Numbers 3 and 14 and, alternatively, the Court's failure to submit a proper definition as requested by appellant.

(3) The Court's failure to submit the component part of the controlling fact issue (requested Issues 3 and 1004 14), i.e., whether the windows or portholes on the J. C. STEPHENS not being in a watertight condition (as found by the jury in Special Issue No. 2) and the deck above the galley of the J. C. STEPHENS not being in a watertight condition (as found by the jury, Special Issue No. 13) were each a proximate cause of appellant's injuries.

(4) The Court's failure to submit the requested issues (Special Issues Numbers 3 and 14) constitutes a denial of due process under the Constitution of the United States and the Constitution of the State of Texas.

(5) The Court's failure to answer and/or give a correct definition and instruction to the jury after the jury retired and sent out a question reading as follows:

"Judge Long: In Special Issue No. 3 is the term 'unseaworthy' referring to the vessel *as a whole*, or the three windows on the port side?" Signed "James H. Brown, Foreman."

(6) The Court's failure to include in the damage issue (Issue No. 34) as an element of damage the loss of the reasonable value of food and lodging which petitioner received in addition to moneys paid him as wages.

(7) The Court's admission of the evidence of the witnesses Harry A. Barkley and Raymond L. Vandever.

(8) The Court's failure to sustain petitioner's motion to strike all or portions of such evidence.

Under the count for unseaworthiness because of breach of warranty, express or implied, negligence is no part 1095 of the case and need not be proven. A claim for

indemnity for personal injuries by reason of unseaworthiness arises out of breach of contract, express or implied. Once facts constituting unseaworthiness in law proximately causing injuries or damages are shown, liability attaches. The question of foreseeability, or the failure to exercise ordinary care do not constitute any element of recovery. Unseaworthiness is a species of liability without fault, immemorially recognized in admiralty. It may be stated to cover any defect or inadequacy of a vessel, or its gear or appurtenances, or the general competency of its officers and crew. The duty to supply a seaworthy vessel, seaworthy appliances, gear, etc. is absolute and not dependent on a failure to exercise due care. In this respect the maritime law differs from the law as generally applied to injuries sustained ashore, where proof of negligence is essential to recovery for damages for personal injuries.

Socony-Vacuum Oil Company v. Smith, 59 S. Ct. 262, 305 U.S. 424;

The Arizona v. Anelich, 298 U.S. 110, 56 S. Ct. 707, 80 L. Ed. 1075;

Beadle v. Spencer, 298 U.S. 124, 56 S. Ct. 712, 80 L. Ed. 1082;

Mahnich v. Southern Steamship Co., 64 S. Ct. 55, 321 U.S. 96, 88 L. Ed. 561;

Inter-Ocean Steamship Co. v. Topolofsky, 165 F. 2d 308;

Armit v. Loveland, 115 F. 2d 308;

Pope & Talbot, Inc. v. Hawn, 198 F. 2d 800, affirmed 346 U.S. 406, 74 S. Ct. 202;

The Osceola, 189 U.S. 158, 23 S. Ct. 384, 27 L. Ed. 860;

1006 Seas Shipping Co. v. Sieracki, 149 F. 2d 98, 328 U.S. 85, 66 S. Ct. 872;

Alaska Steamship Co. v. Petterson, 205 F. 2d 478, 347 U.S. 396, 74 S. Ct. 601;

Rogers v. United States Lines (3rd Cir.), 205 F. 2d 57, 347 U.S. 984, 74 S. Ct. 849;

Strika v. Holland America Line, 90 F. Supp. 524;
The H. A. Scandrett (Sellon v. Great Lakes Transit
Corporation) (CCA 2nd Cir.), 87 F. 2d 708;
The Seeandbee (CCA 6th Cir.), 102 F. 2d 577;
Balado v. Lykes Bros. Steamship Co., 179 F. 2d 943;
Cannella v. Lykes Bros. S.S. Co. Inc., 174 F. 2d 794,
Cert. Den. 70 S. Ct. 102; 338 U.S. 859, 94 L. Ed.
526;
Boudoin v. Lykes Bros. Steamship Co., Inc., 112 F.
Supp. 177, 211, F. 2d 618, 75 S. Ct. 382;
Berti v. Compagnie De Navigation Syrien Fabre (2nd
Cir.), 213 F. 2d 397.

Perhaps the clearest pronouncement on the doctrine of "liability without fault" (unseaworthiness) is found in *Hawn v. Pope & Talbot, Inc.*, supra, affirmed by the United States Supreme Court. The Circuit Court, 198 F. 2d 800 at pages 804-805.

The Supreme Court of the United States in affirming the *Pope & Talbot* case, supra, on page 208 (74 S. Ct.) stated as follows:

"The right of seamen to recover for unseaworthiness is peculiarly a cause of admiralty and maritime jurisdiction. One Stat. 73, 77. *The right is in the nature of liability without fault* for which contributory negligence is not a bar to recovery, although it may be relevant in assessing the damages. *Seas Shipping Company v. Sieracki*, 149 F. 2d 98, 328 U.S. 85, Erie 1007 Ry. Company v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, is irrelevant in that unseaworthiness is a Federally created right, so State law on a State cause of action is not an issue ***."

"(74 S. Ct. p. 210) "Of course, when State courts purport to enforce Federally created rights, they must apply the contents of those rights as determined by this Court. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 63 S. Ct. 246, 87 L. Ed. 239."

In *Alaska Steamship Company v. Petterson*, 205 F. 2d 478, affirmed 74 S. Ct. 601, Chief Justice Denman of the United States Court of Appeals for the 9th Circuit stated as follows:

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"It is not necessary to show, as it is in negligence cases, that the shipowner had complete control of the instrumentality causing the injury, * * * or that the result would not have occurred unless someone were negligent, * * * It is only necessary to show that *the condition* upon which the absolute liability is determined—unseaworthiness—exists."

The doctrine of unseaworthiness has been extended to include members of the crew when a member thereof is not "equal in disposition or seamanship to the ordinary men in the calling." *Boudoin v. Lykes Bros. Steamship Co., Inc.*, 112 F. Supp. 177, 211 F. 2d 618 (5th Cir.), 75 S. Ct. 382. In that case Boudoin sued the shipowner under the doctrine of unseaworthiness because a fellow crew member assaulted him. The trial court allowed judgment on the basis of facts found by it, namely that Gonzales (the aggressor) "was a person of dangerous propensities and proclivities" at the time of his assault upon plaintiff; that Gonzales was "a person of violent character, belligerent disposition, excessive drinking habits, disposed to fighting and making threats and assaults". The Fifth Circuit reversed. The Supreme Court, after granting certiorari, reversed the Fifth Circuit and affirmed the trial court, stating as follows:

"We think the record does not warrant rejection of the District Court's findings and that the findings warrant recovery, *for breach of the warranty of seaworthiness.*"

Under the authorities hereinabove cited, a seaman, member of the crew of a vessel, who receives injuries as a result of an unseaworthy condition existing aboard said vessel, i.e., a defective appliance, appurtenance, or any defective part of a vessel, is entitled to damages suffered by him as a result thereof even though the shipowner exercises care to prevent the existence of the defect, i.e., unseaworthy condition, etc.

Petitioner's pleading specifically sets out *the facts* constituting unseaworthiness in law as follows: (Paragraph V, Tr. pp. 6 and 7)

"Plaintiff further alleges that as a concurrent cause of the injuries sustained by him was the unseaworthiness

of the said J. C. STEPHENS, proximately causing his injuries in that the portholes on said vessel were unseaworthy, i.e., they were not watertight; that by reason of such unseaworthy portholes whenever said vessel would encounter seas which would strike at or near the area where the portholes are located, or by reason of sea spray at sea, water would come through said leaking or otherwise unseaworthy portholes causing said water to fall or accumulate and/or remain on said stairs leading to and from the galley which either by itself, or in connection with other slippery substance that may have accumulated on said stairs caused plaintiff's injuries, as hereinabove alleged.

1009 "Plaintiff would further show that said vessel was unseaworthy in that the deck above galley was not watertight so that any water that would accumulate on the deck or be on the deck, instead of draining through scuppers or remaining on said deck, would come through said ceiling into the galley and on to the stairs leading to and from said galley. That the portholes were leaking and unseaworthy and the gaskets were improperly placed so that sea water would leak through, causing said stairs to be wet and slippery, that singly and together with the oil and grease on said steps caused a serious and dangerous condition to exist to those working in that area and particularly to plaintiff herein."

At the conclusion of the evidence, petitioner requested the following issues:

SPECIAL ISSUE No. 1 (which the Court gave,
Tr. 21)

Do you find from a preponderance of the evidence that on or about October 19, 1950, plaintiff Richard A. McAllister received an injury to his body while attempting to walk down the stairs leading from the lounge to the galleys of the M/V J. S. STEPHENS? Answer "Yes" or "No".

To which the jury answered "Yes".

SPECIAL ISSUE No. 2 (which the Court gave,
Tr. 21)

Do you find from a preponderance of the evidence that, at the time and on the occasion in question, the portholes or windows over and near the galley stairs leading to and from the lounge of the crew ship in question were not in a watertight condition?

1010 Answer "They were not" or "They were".

To which the jury answered "They were not".

REQUESTED SPECIAL ISSUE No. 3 (which the Court REFUSED, Tr. p. 38)

If you have answered the preceding Special Issue (No. 2), "They were not", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 3

Do you find from a preponderance of the evidence that the portholes or windows over and near the galley stairs leading to and from the lounge of the crew ship in question, not being in a watertight condition, if you have so found, was a proximate cause of the injuries, if any, sustained by the plaintiff Richard McAllister at the time and on the occasion in question?

Answer "Yes" or "No".

Instead the Court submitted its **SPECIAL ISSUE No. 3** and definition reading as follows (Tr. 21 and 22).

If you have answered the preceding special issue "They were not", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 3

Do you find from a preponderance of the evidence that the portholes or windows in question not being in a watertight condition, if you have so found in answer to Special Issue No. 2, made the crew ship in question "unseaworthy", as defined herein?

1011 You are instructed that the term "unseaworthy", as used herein, means that a vessel with its appliances and fittings is not reasonably fit for the purposes for which it is being used.

Answer "Yes" or "No".

To which the jury answered "No".

The above issue No. 3 was followed with SPECIAL ISSUE No. 4, proximate cause issue, which in view of their answer to Special Issue No. 3, under the Court's instruction, the jury did not answer. (Tr. 22)

SPECIAL ISSUE No. 13 (which the Court gave Tr. 25)

Do you find from a preponderance of the evidence that, at the time and on the occasion in question, the deck above the M/V J.C. Stephens galley was not watertight?

Let the form of your answer be "It was Not"; or "It was".

Answer: "It was not."

REQUESTED SPECIAL ISSUE No. 14 (which the Court REFUSED, Tr. p. 14)

If you have answered the preceding Special Issue (No. 13) "It was not", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 14

Do you find from a preponderance of the evidence that the deck above the galley not being watertight, if you have so found, was a proximate cause of the injuries, if any, sustained by the plaintiff Richard McAllister at the time and on the occasion in question.

Answer "Yes", or "No".

1012 Instead the Court submitted its SPECIAL ISSUE No. 14 and definition, reading as follows. (Tr. 25)

If you have answered the preceding special issue "It was not", then you will answer the following special issue; otherwise, you need not answer it.

SPECIAL ISSUE No. 14

Do you find from a preponderance of the evidence that the deck above the galley not being watertight, if you have so found in answer to special issue No. 13, made the *crew ship* in question "unseaworthy", as defined herein?

You are instructed that the term "unseaworthy", as used herein, means that a vessel with its appliances and fittings is not reasonably fit for the purposes for which *it* is being used.

Answer "Yes" or "No".

To which the jury answered "No".

The above issue No. 14 was followed with SPECIAL ISSUE No. 15, proximate cause issue, which in view of their answer to Special Issue No. 14, under the Court's instructions, the jury did not answer. (Tr. 26)

Petitioner timely and properly presented his objections and exceptions to the Court's submission of Special Issue No. 14 (Tr. pp. 40, 41, 42), and specifically requested the following issue which the Court refused.

SPECIAL ISSUE No. 14

Do you find from a preponderance of the evidence that the deck above the galley not being watertight, if you have so found, was a proximate cause of 1013 the injuries, if any, sustained by the plaintiff Richard McAllister at the time and on the occasion in question.

Answer 'Yes', or 'No'.

The Court overruled petitioner's timely objections and exceptions to the submission of Special Issues Numbers 3 and 14 respectively, and refused to submit Special Issues Numbers 3 and 14, as requested by petitioner, and refused to give the definitions submitted by petitioner in connection with Special Issues Numbers 3 and 14, as submitted by the Court over petitioner's objection.

Petitioner's objections and exceptions were not only legally proper but clearly pointed out to the trial court that Issues Numbers 3 and 14, and the definitions in connection with them, as submitted by the Court were confusing to the jury as evidenced by the jury's question which they sent out within twenty or thirty minutes after they began deliberations, reading as follows:

"Judge Long: In Special Issue 3, is the term 'unseaworthy' referring to the vessel as a whole, or the three windows on the portside?" Signed, "James H. Brown, Foreman."

After such question was sent out petitioner again requested the Court to answer the juror's question, as follows:

"In reply to your question you are instructed that the term 'unseaworthy' as given to you in connection with

Special Issue No. 3 refers to the three windows on the port side."

The Court refused to give such timely requested instruction, instead answered as follows:

1014 "Gentlemen of the Jury: The Court's charge contains definitions and instructions. I can instruct you no further." Signed: "Chas. E. Long, Jr."

Before the Court's answer was delivered to the jury, petitioner made further objection to the Court's failure to answer the jury's question, and the Court's failure to submit the definition of 'unseaworthy' as originally requested by petitioner as follows:

"You are instructed that by the term 'unseaworthy' as used herein is meant the portholes and fittings were not fit for such purposes as the portholes and fittings were generally used."

Upon the Court's failure to answer the jury's question, and its failure to substitute the definition as requested by petitioner, they answered Special Issues Numbers 3 and 14 "No", as indeed under the definition they were bound to do; and, under the Court's instructions were not required to answer, and did not answer, the proximate cause issues, Special Issues Numbers 4 and 15. That petitioner was prejudiced by the Court's error in submitting Special Issues Numbered 3 and 14 respectively and by the erroneous definition of "unseaworthy" as given by the Court, that is, applying the term "unseaworthy" to the vessel as a whole rather than to the specific port holes or windows and the deck above the galley made the basis of this suit is obvious for it not only compelled the jury to answer Special Issues Numbers 3 and 14 "No", but it prevented the jury, under the Court's specific instructions, from answering the proximate cause issues Numbers 4 and 5 respectively.

1015 That the jurors were mislead and confused by Special Issues Numbers 3 and 14 respectively, and the definition following such issues, is obvious by the question they sent out, as well as by the affidavits of the six jurors, one of whom was the Foreman and at least one of them, Mr. Bird, was a retired Naval Officer of the United States who knew and understood ships.

ARGUMENT AND AUTHORITIES UNDER POINTS NUMBERS THREE
AND FOUR

As heretofore set out in the preliminary statement petitioner obtained a jury finding that (1) he received an injury to his body while going down the stairs leading from the lounge to the galley of the M/V J. C. STEPHENS (Special Issue No. 1); (2) that the portholes or windows over and near the galley stair leading to and from the lounge of the crew ship in question were not in a watertight condition Special Issue No. 2), and (3) that the deck above the M/V J. C. STEPHENS galley was not watertight. (Special Issue No. 13). Petitioner complains of the grievous error in the Court's submission of Special Issues 3 and 14, and since they involve exactly the same point, they are dealt with together. The Court's wording of Special Issues 3 and 14 respectively, and the definition given compelled the jury to answer these two issues NO! Indeed, the jury had no choice but to do so, because such issues instructed the jury that they must find the crew ship *as a whole* unseaworthy before they could answer these issues in the affirmative. Petitioner objected and excepted to these issues and clearly pointed out the error to the trial court.

Petitioner's theory of the case, supported by pleading and proof, was that the portholes or windows on the port side of the vessel, and the deck above the galley were not watertight, and, therefore, as a matter of law, unseaworthy, which condition proximately caused petitioner's injuries. Thus issues Numbers 2 and 13 should have been followed by issues inquiring of the jury whether the portholes or windows not being watertight (petitioner's Requested Special Issue No. 3) and the deck above the galley not being watertight. (Petitioner's Requested Issue No. 14) were each a proximate cause of petitioner's injuries. The Court refused to submit such issues but instead submitted its Special Issues Numbers 3 and 14. These issues, as submitted by the Court, imposed a greater burden upon petitioner than required by law in that they required him to prove that, by reason of the windows or portholes and the deck above the galley not being watertight rendered the *whole* vessel unseaworthy.

The legal test being whether the windows or portholes on the port side of the deck above the galley, not being water-

tight, renders such particular part of the vessel unseaworthy. Obviously, the jury could not conclude as a factual matter that the defective condition of the portholes made the ship as a whole unseaworthy. A jury composed of laymen, not familiar with nor instructed on the principle of unseaworthiness as applicable to the relationship of shipowner and seaman could easily conclude, as indeed the jury did here, that a ship can sail all over the Gulf of Mexico with portholes and deck over the galley not watertight and still be considered reasonably fit for the purposes for which it is being used. In this instance, transporting drilling crew members to and from location, just like a vessel with two missing hatch covers, *Pope & Talbot v. Hawn*, 198 F. 2d 800, 346 U.S. 406, 74 S. Ct. 202; a defective door knob, the H. A. Scandrett, (*Sellon v. Great Lakes Transit Corporation*, (C.C.A. 2d Cir.), 87 F. 2d 708; a defective block, *Seas Shipping v. Sieracki*, 149 F. 2d 98, 328 U.S. 85, 66 S. Ct. 872; defective ladder leading to and from the vessel to the dock, *United States v. Smith*, 220 F. 2d 548; a defective rope, *Manich v. Southern S.S. Co.*, 64 S. Ct. 455, 321 U.S. 96; *Dixon v. United States*, 120 F. Supp. 747; failure of lighting in a specific hatch, *Crawford v. Pope & Talbot*, 206 F. 2d 784; the absence of a cover guard over a radiator, *Bentley v. Albatros Steamship Co.*, 203 F. 2d 270 (the shipowner was held liable for unseaworthiness even though this seaman was in a drunken stupor at that time); a defective handle on a hatch cover causing oil to accumulate on the deck, *Lauro v. United States*, 162 F. 2d 32; an unguarded part of a moving pump, *The Sealandbee*, 102 F. 2d 577, p. 581; a seaman of vicious proclivities, *Keen v. Overseas Tankship Corp.*, 194 F. 2d 515, Cert. Den., 72 S. Ct. 1061, 343 U.S. 966, 96 L. Ed. 1363. All have been held to be unseaworthy as a matter of law. None of the conditions hereinabove set out affected the vessel as a whole. Indeed, the vessel can be reasonably fit for the purposes for which it is being used and still have a defective rope, a missing hatch cover, or a missing guard rail over a pump, or a guard over a radiator, or a defective handle on a hatch cover, yet the Courts have held as a matter of law such omissions or defects constitute unseaworthiness in law.

To inquire of a jury whether a defective rope aboard a vessel with many other good ropes aboard, a defective

handle to a hatch cover, a missing guard over a radiator, a missing guard rail over a pump, portholes that are not watertight, or a deck over a galley not being watertight, etc., renders the vessel *as a whole* unseaworthy from a factual standpoint, as done in the case at Bar, would 1018 make the doctrine of unseaworthiness as applied by the Supreme Court of the United States unrealistic and not in keeping with the board protection given American Merchant Seamen under the Admiralty Rule of unseaworthiness.

That the jury was confused about the matter is obvious by the question they sent out asking the Court to instruct them whether the term "unseaworthy" referred to the vessel *as a whole* or the particular parts inquired about in Special Issue No. 3. The Court's refusal to answer the question (see Stipulation Court of Civil Appeals and Motion for New Trial, Tr. pp. 56, 57), left the jury with an instruction that before they could answer this Special Issue No. 3 in the affirmative they must find the crew ship *as a whole* unseaworthy. Unquestionably that is what both issues (Issues Numbers 3 and 14) and the definition say, and obviously that is what it meant to the jury as evidenced by the question they sent out. Because the Court refused to answer the jury's question and because of the Court's failure to submit to the jury Special Issues Numbers 3 and 14 as requested by petitioner, and further by the Court's failure and refusal to submit the definition of "unseaworthiness" requested by petitioner both before the jury retired for their deliberation and after they sent the question out, they naturally answered Special Issues Numbers 3 and 14 "No". And, as instructed by the Court, did not answer Special Issues Numbers 4 and 15 (proximate cause) respectively. Thus the jury has been erroneously asked to resolve a question of law. In any event, Issues 3 and 14 placed a greater burden upon petitioner than required by law. Under our Texas practice only ultimate fact issues may be submitted to a jury.

Even in our Federal Courts where cases such as these are submitted either under a general charge or by a 1019 general charge and special interrogatories under Rule 49 of the *Federal Rules of Civil Procedure*, the jury is only asked to pass on disputed fact questions. It is true that under Federal practice the Court instructs the

jury generally on the applicable law and under such circumstances explains to the jury what is meant by unseaworthiness and then instructs the jury that if they find a specific condition complained of, i.e., in this instance the portholes were not watertight and/or that the deck was not watertight and such condition proximately caused the seaman's injuries, then the Court instruct them that such condition amounts in law to unseaworthiness and they must find for the plaintiff regardless of negligence. The latest and clearest presentation of the principle of law applicable in this case especially with reference to what constitutes "unseaworthiness" in law and the proper method of submitting such question to the jury can be found in *Hawn v. Pope & Talbot, Inc.*, 198 F. 2d 800 at pp. 804 and 805, affirmed 74 S. Ct. 202, 346 U.S. 406; and in *Petterson v. Alaska Steamship Co.*, 205 F. 2d 478, affirmed 74 S. Ct. 601. In the *Petterson* case, supra, the Court of Appeals stated as follows:

"If the block was being put to a proper use in a proper manner, as found by the District Judge, it is a logical inference that it would not have broken unless it was defective—that is, unless it was unseaworthy. ***"

"In making this inference we do not rely upon the tort doctrine of *res ipsa loquitur* although the result is similar. *Res ipsa loquitur* is a doctrine of causation usually applied in cases of negligence. Here we are dealing with a species of strict liability regardless of fault ***"

1020 "It is only necessary to show that the condition upon which the absolute liability is determined—unseaworthiness—exists. *Mahnich vs. Southern Steamship Company*, 321 U.S. 96, 64 S. Ct. 455, 88 L. Ed. 561."

The *Hawn* case, supra, was tried before the United States District Court in Philadelphia, and the Judge submitted the case to the jury under a general charge. The trial judge as duty bound, instructed the jury upon the law and for that reason the charge contains the general principles of law to the effect that under the maritime law there is an absolute duty on the part of the shipowner to provide a safe and seaworthy vessel and to supply and keep in

order the appliances and equipment appurtenant to the ship, but even in such general charge the trial court specifically instructed the jury that a shipowner is liable for any injury sustained if before the vessel arrived in the port of Philadelphia and before the shoreside workers commenced working on the vessel.

"the two hatch covers were missing from the 'tween deck of the No. 4 hold, and that by reason thereof plaintiff fell to the hold below and was injured, your verdict should be for plaintiff: * * *"

Thus, we see that even under a general charge the Court inquired of the jury whether the *facts* complained of (the two missing hatch covers) existed; and, if so, whether such was a proximate cause of plaintiff's injury.

"Under the maritime law there was an absolute duty on the part of defendant, Pope & Talbot, Inc., the operator of the S. S. 'John Dickinson' to provide a safe and seaworthy vessel and to supply and keep in order, the appliances and equipment appurtenant to the ship for the safe use of all shore side workers rendering services with the consent of the defendant, Pope

1021 & Talbot, Inc., and necessary in the performance of the ship's business. This duty extended to the plaintiff who was on board the 'John Dickinson' with the consent of the defendant, Pope & Talbot, Inc., and who was engaged in preparing the ship to receive cargo. This obligation is absolute in character and is not satisfied by the mere exercise of reasonable care. In other words, under the maritime law the operators of the S. S. 'John Dickinson' are liable for any injuries sustained by the plaintiff by reason of the unseaworthiness of the ship or defects in its appliances and this liability follows even if defendant, Pope & Talbot, Inc., has exercised due care. Therefore, if you should find that at the time the S. S. 'John Dickinson' arrived in the port of Philadelphia and before the shore side workers commenced working on the vessel two hatch covers were missing from the hatch in the 'tween deck of the No. 4 hold, and that by reason thereof plaintiff fell to the hold below and was injured, your verdict should be for the plaintiff and against Pope & Talbot,

Inc., even if you should also find that Pope & Talbot, Inc. was not guilty of negligence for any such case, the liability of Pope & Talbot, Inc., is absolute and does not depend upon its failure to exercise due care. In this respect the maritime law differs from the law as generally applied to injuries sustained ashore where proof of negligence is essential to the recovery of damages for personal injuries."

If the *Hawn* case had been tried under the Texas Rules of Civil Procedure the issues propounded to the jury would have been as follows:

Do you find from a preponderance of the evidence that at the time the SS 'John Dickinson' arrived in the port of Philadelphia and before the shoreside workers commenced working on the vessel, two hatch covers were missing from the hatch in the 'tween deck of the No. 4 hold?

1022 Answer "Yes" or "No".

If you have answered the foregoing Special Issue "Yes", the answer:

Do you find from a preponderance of the evidence that the missing two hatch covers in the 'tween deck of the No. 4 hold, if you have so found, was a proximate cause of plaintiff's injuries?

An affirmative answer to these two issues would create liability for the existence of the condition (missing hatch covers) making that portion of the vessel unseaworthy as a matter of law.

It is true that the *Hawn* case involved a Stevedore who came to work on board the SS JOHN DICKINSON, but the decision shows that these principles of law are particularly applicable to seamen members of the crew and that in the *Sieracki* and *Hawn* cases these principles have been extended to also cover Longshoremen and Stevedores.

In the *Sieracki* case, 328 U.S. 85, 66 S. Ct. 872, the Court stated as follows:

"There could be no question of petitioner's liability for respondent's injuries, incurred as they were here, if he had been in petitioner's employ rather than hired by the stevedoring company. That an owner is liable

to indemnify a seaman for an injury caused by the unseaworthiness of the vessel or its appurtenant appliances and equipment has been settled law in this country ever since The Osceola, 189 U.S. 158, 23 S. Ct. 483; 47 L. Ed 760, Mahnich v. Southern S.S. Co., 321 U.S. 96, 99, 64 St. Ct. 455, 457, 88 L. Ed. 561, and authorities cited. And the liability applies as well when the ship is moored at a dock as when it is at sea. See e.g., The Edith Godden, D.C., 23 F. 43; Johnson & Co. v. Johansne, 5 Cir., 86 F. 886; The Waco, D.C., 3 F. 2d 476.

1023 "Obviously the norm of the liability has been historically and still is the case of the seaman under contract with the vessel's owner. This is because the work of maritime service has been done largely by such persons. But it does not follow necessarily from this fact that the liability either arose exclusively from the existence of a contractual relation or is confined to situations in which one exists."

Under our Texas practice only ultimate fact issues are submitted to the jury. From such answers the Court, under the applicable law, determines whether liability exists. Obviously, the question of unseaworthiness is one of law and the Court's use of the term "unseaworthy" in Special Issues Numbers 3 and 14 respectively as well as the definition instructed the jury that before they can answer Special Issues Numbers 3 and 14 "Yes", they must find that the crew ship as a whole must not be fit for the purpose for which it was being used, thus making the term "unseaworthy" apply to the vessel as a whole. Such issue No. 3 and definition is not only erroneous because it submits to the jury a question of law but it imposes an impossible burden on petitioner, certainly a greater burden than contemplated by law. This right to compensatory damages if a seaman is injured by reason of unseaworthiness is a Federally created right as interpreted by the Federal Courts and must so be followed by this Court. *Garrett v. Moore-McCormack*, 317 U.S. 239, 63 S. Ct. 246.

Again we repeat that in cases of this type tried in the Federal Courts, the Court in charging a jury as to unseaworthiness may well explain the term "unseaworthy" as

meaning that the appliances or fittings of a vessel must be reasonably fit for the purpose for which they are being used. (In the case at bar the Court went further 1024 and did not restrict that the appurtenances must be reasonably fit for the purposes for which they are being used but made the reasonably fit doctrine apply to the vessel as a whole). But when in a case tried in Federal Court the judge arrives at a point where the specific disputed facts are submitted to the jury, then the Court is duty bound to specifically charge the jury to find whether the facts complained of exist. Indeed, in the *Hawn* case, supra, the appellate judge in approving the judge's charge stated as follows:

"By the above the jury was generally given a fair idea of the doctrine of seaworthiness as followed in this suit by the trial judge, and *instructed specifically that the sole condition in evidence affected by the rule laid down involved the missing hatch covers.*" (p. 805)

In *Strika v. Holland America Line*, 90 F. Supp. 534, the Court in a seaman's case under Federal Rule 49, submitted special interrogatories to the jury as follows:

1. Did the defendant Netherland Ministry of Traffic Directorate General of Shipping supply or provide the bridles used to lift the pontoon hatch cover? Answer—Yes.
2. Were the bridles suitable for the purpose of moving or lifting pontoon hatch covers? Answer—No.
3. Did the unsuitability of the bridles cause or contribute to the injury to the plaintiff? Answer—Yes.
4. Did the defendant know or have reason to know that the bridles were unsuitable and that the use of the bridles might cause injury to someone such as the plaintiff? Answer—No.
5. What are the plaintiff's damages due to the injury? Answer—\$75,000.00.
- 1025 6. Did any fault on the part of the plaintiff, either by an action of his or a failure to act, contribute to his injury? Answer—Yes.
7. What proposition or percentage of plaintiff's injury was due to his own fault? Answer—10%.

The Court in entering judgment for the plaintiff stated as follows:

"If the answer to question (4) had been "Yes" (Did the defendant know or have reason to know that the bridles were unsuitable, etc.) and the answer to question (6) (Contributory negligence) had been 'No', then the Court would have found the defendant negligent and granted judgment for the plaintiff for the damages stated in answer to question (5). It is clear that the defendant can not be found negligent on the basis of the answers given by the jury. However, on the answers (1) (defendant supplied the bridles), (2) (the bridles were unsuitable), and (3) (proximate cause) the defendant can be found liable for supplying *unseaworthy bridles* which caused the injury if the doctrine of unseaworthiness is found applicable to this case. If the doctrine is applicable then the damages found by the jury, to-wit: \$75,000. would be reduced by 10% (answer to question (7)) and the recovery permitted would be \$67,500.00. Seas Shipping Co. v. Sieracki, 1946, 328 U.S. 85, Footnote 11, 66 S. Ct. 872, 90 L. Ed. 1099."

In the *Strika* case the Court did not even mention the term "unseaworthiness" to the jury but inquired of the jury what factual conditions existed at the time the seaman was injured, and from the jury's answer the Court held the shipowner liable for supplying unseaworthy bridles.

1026 Under our Texas practice and under the authorities herein quoted, the Court's submission of Special Issues Numbers 3 and 14 and the definitions were erroneous and prejudicial for the reasons heretofore stated.

POINT NUMBER FIVE

(Germane to Point Number 15 in Motion for Rehearing)

The Court of Civil Appeals erred in failing to consider and overruling Petitioner's Point Number Three (Court of Civil Appeals) as follows: Seamen members of a crew have an express or implied warranty from the shipowner that their vessel, equipment, appliances and gear, are in seaworthy condition. The breach of such warranty proximately causing injuries makes such shipowner liable for

damages. Special Issues Numbers Three and Fourteen respectively asked the jury to resolve a question of law in contravention to Rule 272, *Texas Rules of Civil Procedure*.

ARGUMENT AND AUTHORITIES UNDER POINT NUMBER FIVE

It is Hornbook Law that a shipowner warrants to its seamen that the vessel and its appurtenances are seaworthy, that is, not defective and in staunch, stout and good condition. A breach of such warranty of seaworthiness proximately causing damages makes the shipowner liable for such damages. The doctrine is contractual in its nature arising out of the contract of employment between the shipowner and its crew. It is a right firmly established in the American Maritime jurisdiction, jealously guarded and liberally interpreted. The *Osceola*, 189 U.S. 158, 23 S. Ct. 483.

- 1027 *Mamilton v. United States*;
Daniels v. Pacific Atlantic Steamship Co., 268 F. 15, 120 F. Supp. 96;
John E. LeGate v. The Panamolga, 221 F. 2d 689;
Seas Shipping Company v. Sieracki, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099;
Pope & Talbot v. Hawn, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143.

A learned discussion of the doctrine of unseaworthiness which we think would be of help to the Court can be found in *Dixon v. United States*, 219 F. 2d 10, decided February 7, 1955.

In the *Osceola*, 189 U.S. 158, 23 S. Ct. 483, the Court stated as follows:

"That the vessel and her own are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship."

In *Alaska Steamship Company v. Pettersen*, 74 S. Ct. 601, 347 U.S. 396, on page 603, Justice Burton, although dissenting that the doctrine of unseaworthiness for which a shipowner was held responsible, extends to a defective appliance brought on the vessel by a stevedore, as a result of which one of the stevedore's employees was injured,

nevertheless reaffirms the implied warranty of seaworthiness applicable to cases such as these; stating as follows:

"This doctrine was a natural outgrowth of the dependence of a ship's crew upon the seaworthiness of the ship and its equipment. Services of a crew
 1028. must be rendered with whatever equipment the shipowner supplies. Such seamen are not expected to supply maritime or loading equipment and it is only fair for the law to subject shipowners to an absolute liability to them for the unseaworthiness of the shipowner's ship or equipment."

In *Daniels v. Pacific-Atlantic S.S. Co.*, 120 F. Supp. 96, at page 97, the Court stated as follows:

".... a claim for indemnity for damages for personal injuries sustained through unseaworthiness of a vessel arises out of breach of contract of implied warranty of fitness of the vessel." The doctrine of implied warranty is firmly established in Texas. *Walker v. Great Atlantic & Pacific Tea Co.* (S. Ct. of Tex.), 112 S.W. 170; *Jacob E. Decker & Sons v. Cappa* (S. Ct.), 164 S.W. 2d 828.

Therefore, the Court's submission of Special Issues Numbers 3 and 14 in effect asked the jury whether respondent breached the contract of warranty, unquestionably a question of law. Petitioner's pleading alleged specific acts which in law amount to unseaworthiness, that is, the portholes or windows on the port side of the vessel and the deck above the galley of said vessel were not watertight, thereby causing water to fall upon the steps underneath said windows or portholes and underneath said deck causing petitioner to fall, producing serious, painful and permanent disabilities. (See testimony of all doctors. Dr. Furman H. Tyners, S.F. p. 109, Dr. Alexander E. Brodsky, S.F. p. 142, Dr. Felix Lattimore Butte, S.F. p. 698, and Dr. James Albert Brown, S.F. 827).

The Court's refusal to submit petitioner's requested Special Issues Numbers 3 and 14 inquiring whether 1029 the facts if found by the jury to exist in response to Special Issues Numbers 2 and 13 respectively, were each a proximate cause of petitioner's injuries prejudiced petitioner because it made the proximate cause issue dependent upon the jury's answer to the law question sub-

mitted them in issues Numbers 3 and 14 whether the vessel as a whole was or was not unseaworthy. The submission of these issues was erroneous because these issues submitted a question of law contrary to Rule 272, *Texas Rules of Civil Procedure*, which, among other things, reads:

"The Judge shall so frame his charge as to distinctly separate questions of law and questions of fact."

and these issues imposed a greater burden upon petitioner than the one required by law in that they required the jury to find that the condition of the portholes or the deck above the galley not being watertight made *the vessel as a whole* unseaworthy. The definitions given by the Court in connection with these issues re-emphasized the error because it too makes the unseaworthiness of the vessel as a whole the primary vice instead of limiting it to the unseaworthiness of the portholes or the deck. The definition defines "unseaworthiness" as a condition that the vessel and its appliances and fittings are not suitable for the purpose for which it (the vessel) is being used.

We repeat that the issues Numbers 3 and 14 with the definitions given in connection with them respectively amounts to an inquiry of the jury whether the warranty of the seaworthiness of the vessel as a whole was breached; which, of course, amounts to asking the jury to resolve a question of law. It has long been the established law of this State that the submission of such an issue is error.

1030 Texas General Indemnity Co. v. Wm. Scott (S. Ct. of Texas), 253 S.W. 2d 651, p. 654;

Jones v. Winter, 215 S.W. 2d 654, W.E.R.-N.R.E.;

Speer's Law of Special Issues of Texas, page 47. (See illustrations p. 47, Section 36, and Section 26, pp. 32 and 33);

Roosth & Genecov Production Co. v. White (S. Ct. of Texas), 262 S.W. 2d 99;

Bonham Coea Cola Bottling Co. v. Jennings, 181 S.W. 2d p. 97, Judgment correct. Writ dismissed;

Consolidated Underwriters v. Vargas, 113 S.W. 2d 922.

Under the foregoing authorities it is respectfully submitted that the Court erroneously submitted Special Issues Numbers 3 and 14 because they asked the jury to resolve a question of law, or a question of mixed law and fact.

POINT NUMBER SIX

(Germane to Point 16 in Motion for Rehearing)

The Court of Civil Appeals erred in failing to consider and overruling Petitioner's Point Number Four (Court of Civil Appeals) reading as follows: The Court's instruction ~~not~~ to answer Special Issues Numbers Four and Fifteen unless they answered Issues Three and Fourteen in the affirmative constitutes a denial of due process under the Fifth Amendment of the *Federal Constitution*, a denial of Petitioner's rights under the Seventh Amendment of the *Federal Constitution*; and a denial of Petitioner's right under Article I, Section 15, and Article V, Section 10 of the *Constitution of the State of Texas* to right of trial by jury on one of the pivotal elements of his cause of action.

As heretofore stated the jury found that the portholes and the deck above the galley were not watertight. 1031 The Court, however, erroneously refused petitioner's requested issues whether the portholes or the deck above the galley not being watertight proximately caused petitioner's injuries. Instead the Court instructed the jury that if they answered the issues with reference to the portholes and the deck above the galley in the affirmative, then to answer Special Issues Numbers 3 and 14 whether such condition caused the vessel *as a whole* to become unseaworthy and further instructed the jury that only upon an affirmative answer to Special Issues 3 and 14 to then answer the subsequent proximate cause issues. As demonstrated, the jury by the wording of Special Issues Numbers 3 and 14 and by the Court's failure to answer the question they sent out during their deliberations felt duty bound to answer such Special Issues "No" and, therefore, were instructed not to answer the proximate cause issues.

Petitioner having obtained a favorable finding to the fact issues (2 and 13) amounting to unseaworthiness in law was entitled to have the jury pass on the proximate cause issues. Under the Court's instructions petitioner was denied this in contravention to the due process clause of the Fifth Amendment of the Constitution and the Constitution of the State of Texas. Petitioner having filed his request for jury and paid the jury fee as required by statute. Being entitled to a jury trial and having complied with all the requirements to obtain one, his right of trial by jury brings

into play the Seventh Amendment of the Constitution of the United States, reading as follows:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of 1032 the United States, then according to the rules of the common law."

Article 1, Section 15 of the *Constitution of the State of Texas*, among other things, states:

"The right of trial by jury shall remain inviolate * * *"

In the interpretative commentary appearing in Volume 1, Vernon's Civil Statutes, "*Constitution*" on page 357, the following appears:

"In civil cases for the trial of a cause, wherein a fact situation is raised by the pleadings, either party is entitled to a jury upon a demand made to the court and the payment of the jury fee. *Hammon v. Ashe*, 131 S.W. 589; *Thorne v. Moore*, 105 S.W. 985; *Blair v. Paggi*, Com. App., 238 S.W. 639. If these conditions are met, the right is inviolate."

Article V, Section 10 of the *State Constitution* reads as follows:

"In the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury; etc. * * *"

It is undisputed that within the proper time the jury fee was paid as provided for by the Legislature, and written request for jury trial was made. A jury was impaneled and issues submitted to the jury, but the method and manner in which such issues were submitted deprived petitioner of a jury trial on the issue upon which the recovery for his hurt depended. *Wilkerson v. McCarthy*, 69 S. Ct. 313, 336 U.S. 53. The case at bar is a much more aggravated one than the *Wilkerson* case because here the jury was 1033 prevented by the Court's instructions from answering a fact issue upon which his recovery depended.

A jury trial having been properly demanded and all necessary formalities having been complied with his right

214

to a jury trial was a constitutional right and its denial has been condemned.

Firemen's Mutual Insurance Co. v. Aponaug Mfg. Co., Inc., 149 F. 2d 359;
Tompkins v. Erie Ry. Co. (C.C.A. 2d), 98 F. 2d 49.

POINT NUMBER SEVEN

(Germane to Point No. 17 in Motion for Rehearing)

The Court of Civil Appeals erred in failing to consider and overruling Petitioner's Point Number Five (Court of Civil Appeals) reading as follows: The Court erred in refusing to answer the jury's question inquiring whether by the term "unseaworthy", as inquired about in Special Issue Number Three, the Court referred to the vessel as a whole or to the three windows on the port side.

POINT NUMBER EIGHT

(Germane to Point No. 19 in Motion for Rehearing)

The Court of Civil Appeals erred in failing to consider and overruling Petitioner's Point Number Seven (Court of Civil Appeals) reading as follows: The Court erred in failing to answer the jury's question by submitted a corrected definition of "unseaworthy" in connection with Special Issue Number Three as requested by Petitioner reading as follows: "You are instructed that by the term 'unseaworthy', as used herein, is meant that the port-holes and their fittings are not fit for the purposes for which said portholes were used.

ARGUMENT AND AUTHORITIES UNDER POINTS NUMBERS SEVEN AND EIGHT

Within twenty or thirty minutes after the jury retired to consider their verdict they sent out a question which emphasizes the Court's erroneous submission of Special Issues Numbers 3 and 14, respectively, the question reading as follows:

"Judge Long: In special issue 3 is the term unseaworthy referring to the vessel *as a whole* or the three windows on the port side?" Signed "James H. Brown, Foreman".

Obviously, the jury, from the evidence presented to them, recognized that unseaworthiness of the vessel as a whole,

as a factual matter was not in issue; that the only matters in issue were the unseaworthy condition of the portholes on the port side of the vessel and the deck above the galley. With commendable clarity and intelligence the jury presented the Court with the hereinabove quoted question. Upon the Court's advising the jury that it must refer back to the definitions and instructions and that he could instruct them no further, they naturally felt bound by the definition. Therefore, before they could answer Special Issues Numbers 3 and 14 in the affirmative they must find the vessel *as a whole* unseaworthy. We have already pointed out that such a submission is erroneous because it submitted to the jury a question of law, and imposed a greater burden upon petitioner than the one required by law. Obviously, in view of the evidence in this case, the jury was confused by such instruction. That issues Numbers 1035 3 and 14 and the definition were confusing to petitioner's prejudice was clearly pointed out to the Court (Tr. R. 56, 57). The Court's failure to correct such issues and/or definition before submitting them to the jury as well as after the jury sent out the question relating thereto prejudiced petitioner's right under the applicable law.

In *Balado v. Lykes Bros. Steamship Co., Inc.*, 179 F. 2d 943, the Second Circuit, Court of Appeals reversed the case by the District Judge because the trial court's charge was confusing to the jury on the question of unseaworthiness. The trial court charged the jury as follows:

"The owner owes each member of the crew, this plaintiff in particular, a seaworthy vessel, that is a vessel that is calculated to meet all the risks of its trip or voyage on which it sets out". But he added: "you will have to determine whether she sailed with a sprung door and whether the defendant should have known the door was sprung. ***"

'If the vessel started out *with a door that was sprung or was otherwise inadequate to keep sea water from entering the crew's messroom*, and there was evidence from which a jury might find that the ship sailed in such a condition *and that the plaintiff's injuries were caused by it*, the owner was liable for sailing with *an unseaworthy vessel* irrespective of negligence or knowl-

edge of the condition of the vessel prior to her sailing. The H. A. Scandrett, 2 Cir., 87 F. 2d 708. In the circumstances, there is confusion as to the meaning of the charge and doubt whether the judge did not intend to require the jury to find not only that the door was sprung before the ship sailed but also to find defendant ought to have known that the door was sprung before liability for unseaworthiness could be imposed."

1036 Had the Court submitted Special Issues Numbers 3 and 14 as requested by petitioner or submitted the definition of "unseaworthy" timely presented to the Court, the prejudicial errors (Points 5, 6 and 7) would not have arisen, but, once the Court did submit such issues with a definition of unseaworthiness, the Court was then obligated to answer the jury's question as requested by petitioner, pointing out, as in *Hawn v. Pope & Talbot, Inc., supra*, that the sole condition complained about—supported by pleading and evidence—was that the three windows on the port side of the M/V J. C. STEPHENS were not watertight, and that the deck above the galley was not watertight; and, therefore, the definition of "unseaworthiness" refers only to the port holes or windows, and to the deck above the galley. By this procedure the jury would at least have had a clear understanding of the issues involved, and plaintiff would have had some measure of due process of law guaranteed to him by the Fifth and Seventh Amendments to the Constitution of the State of Texas. While we fully realize that the affidavits of the jurors attached to the Motion for new trial are not evidence; but we deemed them proper to help point out forcefully to the trial judge below and now, here, on appeal, the errors inherent in Special Issues Numbers 3 and 14 respectively, and the gross miscarriage of justice, which they produced.

POINT NUMBER NINE

(Germane to Point No. 22)

The Court of Civil Appeals erred in failing to consider and overruling Petitioner's Point Number Ten (Court of Civil Appeals) reading as follows: The testimony of 1037 Appellee's expert witnesses, Barkley and Vandever, was inadmissible because the tests they made and upon which they predicated their testimony, were not made

under the same conditions that existed at the time when Appellant slipped on the wet steps and injured himself. The Court's failure to sustain Appellant's objection to such testimony, and the Court's failure to sustain Appellant's motion to strike such testimony from the Record constituted prejudicial error.

ARGUMENT AND AUTHORITIES UNDER POINT NUMBER NINE

The witness Ferdinand B. Dressel, Captain of the vessel upon which petitioner was serving, testified that petitioner slipped on a wet ladder (wet from sea water) steps leading from the lounge of the vessel to its galley (S.F. 15-18), fell and injured himself. Petitioner also testified he slipped and fell because such ladder was wet from sea water and oil film (S.F. 54-57).

The petitioner was injured October 9, 1950. On January 21, 1955 (S.F. 790) respondent submitted the ladder in question to its witness Raymond L. Vandeveer for test to determine the slipperiness of such ladder under certain conditions. This witness testified that before he began such tests he first thoroughly cleaned the ladder to remove any foreign matter on it (S.F. 791) and then thoroughly cleaned the sole of a shoe to be used also in the test (S.F. 792). He further testified he conducted a friction test with the ladder and shoe sole dry (S.F. 797), then with hydrant water on the ladder (S.F. 797-798), then with a salt water solution, which he prepared, on the ladder (S.F. 799), then with crude oil on the surface of the ladder steps (S.E. 1038-801) for the purpose of determining the slipperiness of the ladder under such laboratory conditions. He further testified that before applying each solution to the shoe he was using, he used sand paper on the shoe sole (S.S.F. 798). This witness, over petitioner's objections, was then permitted to testify that it was more difficult to slip on such ladder with any of these laboratory solutions on it than it would be if the ladder was dry (S.F. 807).

Sea water was not used in this test, nor was the testing apparatus used subject to any rolling or pitching motions, such as a vessel at sea would experience, when the tests were made.

Also over petitioner's objections, respondent's witness, Harry A. Barkley, was permitted to testify as to similar laboratory experiments he had made in January, 1955, none existed at the time petitioner was injured.

104

The evidence in the case at bar conclusively shows that the laboratory experiments, from which results respondent's witnesses were permitted to testify, were not conducted under substantially the same conditions which existed at the time of petitioner's injuries. Unless such experiments are conducted under substantially the same conditions which existed at the time of an occurrence made the basis of a suit, the results of such experiments are not admissible in evidence, and it is error to receive into evidence such results, 17 Tex Jur. 401, Sec. 142; *Garza v. San Antonio Transit Co.*, 180 S.W. 2d 1906, Writ ref. W.M.; *Norris Bros. v. Mattinson*, 145 S.W. 2d 204.

1039

CONCLUSION

WHEREFORE, Petitioner prays that upon consideration of this application Writ of Error be granted, and that upon final hearing, the judgment of the district court and the Court of Civil Appeals denying Petitioner compensatory damages be reversed and this cause remanded for a new trial.

Respectfully submitted,

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Of Counsel:

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Attorneys for Respondent are Frank C. Bolton, Jr., Earl A. Brown, and Charles B. Wallace, P. O. Box 900, Dallas, Texas. Copies of this application for Writ of Error have been mailed to said attorneys by Petitioner.

ARTHUR J. MANDELL

ARTHUR J. MANDELL

1040 Clerk's Certificate to foregoing paper omitted in printing.

1041

(File Endorsement Omitted)

INDEX

	Page
STATEMENT OF NATURE AND RESULT OF THE CASE	484
RESPONDENT'S COUNTER POINTS	484
COUNTER POINT 1 (In reply to Petitioner's Point 1)	484
COUNTER POINT 2 (In reply to Petitioner's Points 2, 3, 4, 5, 6, 7, 8, and 9)	484
STATEMENT	484-485
ARGUMENT AND AUTHORITIES	485-490

	Page
Bonam v. Southern Menhaden Corporation, 284 F. 362	486
Borgman v. Sword Line, Inc., New York S. Ct., 81 New York Supp. 2d 445	488
Campbell v. Haverhill, 155 U. S. 610	489
Engel v. Davenport, 271 U. S. 33	487
Gautier v. Franklin, 1 Tex. 732	489
Jones Act, Title 46, sec. 688, U.S.C.A.	484
Judiciary Act of 1789, 28 U.S.C.A., sec. 1333	485, 486
Marshall v. International Mercantile Marine Co., 2 Cir., 39 F. 2d 551	488
McGhee v. United States, 2 Cir., 165 F. 2d 287	487
McGrath v. Panama R. Co., 5 Cir., 298 F. 303	486
Morales v. Moor-McCormack Lines, Inc., 5 Cir., 208 F. 2d 218	486
Ran v. Atlantic Refining Co., 87 F. Supp. 853	489
Revised Civil Statutes of Texas, Art. 5526, sec. 6	485
Socony-Vacuum Oil Co. v. Aderhold, Tex. S. Ct., 240 S. W. 2d 751	489
Tillard v. Hall, 32 S. W. 2d 863	489
Untersinger v. Keystone Tankship Corp., 1948 A.M.C. 1899 (E.D. Pa.)	489
45 U.S.C.A. sec. 51	486

IN THE SUPREME COURT OF TEXAS

RICHARD McALLISTER, *Petitioner*

v.

MAGNOLIA PETROLEUM COMPANY, *Respondent*

Reply to Application for Writ of Error—Filed May 14, 1956

STATEMENT OF NATURE AND RESULT
OF THE CASE

The Court of Civil Appeals correctly states the nature and result of this case as tried before the 134th District Court of Dallas County, Texas.

RESPONDENT'S COUNTER POINTS

COUNTER POINT 1

(In reply to Petitioner's Point 1)

The Court of Civil Appeals correctly held that that portion of plaintiff's cause of action for indemnity based on the unseaworthiness of the vessel not resulting from negligence was barred by Art. 5526, sec. 6, Revised Civil Statutes of Texas.

COUNTER POINT 2

(In reply to Petitioner's Points 2, 3, 4; 5, 6, 7, 8, and 9)

The Court of Civil Appeals, having held petitioner's cause of action based upon the alleged unseaworthiness of the vessel was barred by the Texas two-year statute of limitation, did not err in failing to pass upon petitioner's other assignments relating to such cause of action.

STATEMENT

The event on which petitioner predicated all of his three separate causes of action occurred on October 19, 1950 on board the Motor Vessel J. C. STEPHENS, then at sea in the Gulf of Mexico offshore from Morgan City, Louisiana. Petitioner sued for indemnity for injuries arising from numerous alleged acts of negligence on the part of Magnolia Petroleum Company and the crew of the vessel J. C. STEPHENS, a right of action created by Federal statute, Title 46, sec. 688, U. S. C. A., known as the *Jones Act*. Pe-

tioner likewise sought recovery in the nature of indemnity for his injuries sustained in the same fall under the 1046 ancient and general maritime law which permits recovery where the vessel was unseaworthy even though such condition did not result from the negligence of the owner or the crew, or even though it was a condition not known to them. The third cause of action asserted by the petitioner was for maintenance under the general maritime law. Petitioner's right to bring his action at law for negligent injury is authorized by the Jones Act. Petitioner's right to bring his action at law in the State court for indemnity for the unseaworthiness of the vessel, or for negligence, is based upon the "saving to suitors" clause of the *Judiciary Act of 1789*, 28 U. S. C. A., sec. 1333.

Suit was originally filed on August 23, 1953 in a State court in Harris County, Texas and was thereafter transferred to the 134th Judicial District Court of Dallas County, Texas on plea of privilege. All of petitioner's issues relating to the negligence cause of action were answered adversely to him and no complaint of those issues or their submission was made in the Court of Civil Appeals, or on motion for new trial in the trial court. The jury likewise found no unseaworthiness and petitioner was denied recovery on his action for unseaworthiness based upon the jury findings. Petitioner recovered judgment in the amount of \$6258.00 for maintenance. The respondent cross-appealed to the Court of Civil Appeals upon the issue of maintenance, but does not here complain of the judgment of the Court of Civil Appeals affirming against it a judgment for maintenance.

ARGUMENT AND AUTHORITIES

At the outset it should be noted that the Court of Civil Appeals found it necessary to hold only that the cause of action based upon unseaworthiness simpliciter, that is, unseaworthiness not resulting from negligence, was barred by *Art. 5526, sec. 6, Revised Civil Statutes of Texas*, because it was not commenced within two years from October 19, 1950. Having so held, all of petitioner's other points of appeal became immaterial as harmless error, for they related solely to the barred cause of action. Neither was it necessary for the Court of Civil Appeals to consider re-

spondent's other counter points to petitioner's alleged errors, for they, too, related only to the barred cause of action.

Long before the passage of the Jones Act in 1920, seamen could, at their option, seek a common law remedy for a maritime tort in a State court under the provisions of the *Judiciary Act of 1789*, which reads:

"That the district courts * * * shall also have exclusive original causes of admiralty and maritime jurisdiction * * * within their respective districts as well as upon the high seas; *saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.* * * * *"

1048 An alternative remedy for such a seaman was an action at law in a Federal court, in which event the State-prescribed statute of limitations was the applied law under the Rule of Decision Act even though there was no Federal statute of limitations for such action. *Bonam v. Southern Menhaden Corporation*, 284 F. 362.

A third remedy optionally available to such seamen was an action in admiralty, either in personam or in rem, in which event the statutes of the State in which the admiralty court sat were applied by analogy under the equity and admiralty doctrine of laches. *McGrath v. Panama R. Co.*, 5 Cir., 298 F. 303; *Morales v. Moore-McCormack Lines, Inc.*, 5 Cir., 208 F. 2d 218.

Petitioner argues that the period of limitation applicable to the Jones Act by its adoption of the Federal Employers Liability Act applies to all maritime tort cases, but this interpretation is contrary to the language of the Federal Employers Liability Act itself, for it merely gives the cause of action "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its ears, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (Emphasis ours) 45 U. S. C. A., sec. 51.

Petitioner argues that all maritime law was drawn into the Jones Act, whereas, in fact, the Jones Act merely became a part of existing maritime law. This "Jonah swallowed the whale" premise misleads petitioner to his erroneous conclusion that all maritime tort causes of action are barred in three years, no more, no less.

Shortly after the passage of the Jones Act the Supreme Court of the United States had before it the case of *Engel v. Davenport*, 271 U. S. 33, a California case, which jurisdiction had a one-year statute of limitation. The court examined the petition and found that there was an affirmative allegation of negligence in respect to the unseaworthy appliance and held:

"And, having been brought after the passage of the Merchant Marine Act, we think the suit is to be regarded as one founded on that Act, in which the petitioner, instead of invoking, as he might, the relief accorded him by the old maritime rules, has elected to seek that provided by the new rules in an action at law, based upon negligence—in which he not only assumes the burden of proving negligence, but also, under sec. 3 of the Employers Liability Act, subjects himself to a reduction of the damages in proportion to any contributory negligence on his part."

In *McGhee v. United States*, 2 Cir., 165 F. 2d 287, the court interpreted *Engel v. Davenport*, as follows:

"In *Engel v. Davenport*, the question was whether the statute of limitations applicable to railway employees governed an action brought by a seaman under the Jones Act in a state court. The plaintiff had declared for injuries suffered from a defective appliance and had charged that the defect was negligent. The court held that he was privileged to base his recovery upon the Jones Act; and that, if he did, he was free to take advantage of the longer limitation applicable to that cause of action than the state statute would have allowed, had he sued under

the maritime law. That did indeed recognize a cause action under the Jones Act for negligent unseaworthiness, additional to that under the maritime law; and obviously the plaintiff was bound to prove negligence, if he wished to invoke the longer period. (Emphasis ours)

Had this added allegation—negligence—been necessary to his recovery for unseaworthiness, as it was in *Engel v. Davenport*, *supra*, and in *Kunschman v. United States*, *supra*, he would of course have had to prove it."

In *Borgman v. Sword Line, Inc.*, New York S. Ct., 81 New York Supp. 2d 445, the original complaint alleged negligence but not unseaworthiness. More than three years after the date of the injury the complaint was amended to include unseaworthiness and the defendant was permitted to plead in bar the applicable State statute of limitation so that he might be protected if the plaintiff undertook to introduce evidence on trial in support of the unseaworthiness portion of the allegation.

1051 *Marshall v. International Mercantile Marine Co.*, 2 Cir., 39 F. 2d 551, was tried when the Jones Act period of limitations was two years and the applicable State statute for non-negligent maritime torts was three years. The court holds that a different statute applies, stating:

"If the first alternative be assumed, the two-year limitation of the statute creating the cause of action necessarily precludes maintenance of the suit. *Engel v. Davenport*, 271 U. S. 33, 38, 46 S. Ct. 410, 70 L. Ed. 813; *Reading Co. v. Koons*, 271 U. S. 58, 63, 46 S. Ct. 405, 70 L. Ed. 835. If the latter, then the court of admiralty would normally follow the analogy of the state statute of limitations (*Nolte v. Hudson Navigation Co.* [C.C.A.] 297 F. 758), which in New York requires actions for personal injuries to be commenced within three years."

Untersinger v. Keystone Tankship Corp., 1948 A.M.C. 1899 (E. D. Pa.), not reported in the Federal Supplement,

directly holds that a suit in admiralty for injuries based on unseaworthiness is not governed by the three-year period of limitation prescribed in the Jones Act, but is controlled by laches.

The case of *Ran v. Atlantic Refining Co.*, 87 F. Supp. 853, cited in petitioner's application for writ of error on page 8, is a Jones Act case and the court so states, in which case the three-year statute must necessarily apply.

1052 Petitioner's effort to distinguish the holdings on the basis that they only apply to longshoremen is without substance. Longshoremen traditionally were treated as seamen. They had the same rights for maritime torts for unseaworthiness of the vessel, and were accorded the rights given under the Jones Act until they and their employer were placed under the Longshoremen and Harbor Workers Act insofar as the liability of their employer is concerned. However, the rights which they assert against a ship owner or other third parties arising from a maritime tort are governed by general maritime law, and if based upon seaworthiness, are governed by the applicable State statute of limitations, if his remedy is sought in the State court; governed by the State statute of limitations by Rule of Decision Act, if his remedy is sought on the law side in the Federal court; and is based upon the State statute of limitations by analogy if his remedy is in the Federal court on the admiralty side of the docket.

In summary, petitioner selected the State court as his forum to seek his remedy for a maritime tort recognized under ancient maritime law. When he has done so he is entitled to have his case tried in accordance with the substantive rules of his cause of action, but must try his case in accordance with the procedures afforded by the local law. *Socony-Vacuum Oil Co. v. Aderhold*, Tex. S. Ct., 240 S. W. 2d 751.

It has long been settled that a general statute of limitations is procedural rather than substantive. *Gautier v. Franklin*, 1 Tex. 732; *Tilliard v. Hall*, 32 S. W. 2d 863; *Campbell v. Haverhill*, 155 U. S. 610.

WHEREFORE, respondent prays that the application for writ of error be not granted.

Respectfully submitted,

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Certificate of Service (omitted in printing).

1054 Clerk's Certificate to foregoing paper omitted in printing.

1055 IN THE SUPREME COURT OF TEXAS

(Title Omitted)

Order Refusing Application for Writ of Error — July 25, 1956

This day came on to be heard application of petitioner for a writ of error to the Court of Civil Appeals for the Fifth District and the same having been duly considered, and the Court having determined that the application presents no error which requires a reversal of the judgment of the Court of Civil Appeals, it is ordered that the application be refused; that the applicant, Richard McAllister, and surety, Fidelity and Deposit Company of Maryland, pay all costs incurred on this application.

1056 IN THE SUPREME COURT OF TEXAS

(Title Omitted)

Order Overruling Motion for Rehearing — October 3, 1956.

This day came on to be heard petitioner's motion for rehearing of application for writ of error, and, after due consideration, it is ordered that said motion be, and is hereby, overruled.

Clerk's Certificate to foregoing papers omitted in printing.

1057

SUPREME COURT OF THE UNITED STATES

No. 483 MISC., OCTOBER TERM, 1956

RICHARD McALLISTER, *Petitioner*,

vs.

MAGNOLIA PETROLEUM COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO the Court of Civil Appeals of the State of Texas, Fifth Supreme Judicial District.

Order Granting Motion for Leave to Proceed in *Forma Pauperis* and Petition for Writ of Certiorari — February 25, 1957

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 795 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

357 U.S. 221

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 83

RICHARD McALLISTER,

Petitioner,

vs.

MAGNOLIA PETROLEUM COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE
FIFTH SUPREME JUDICIAL DISTRICT

BRIEF ON THE MERITS FOR
PETITIONER, RICHARD McALLISTER

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INDEX

SUBJECT INDEX

BRIEF OF PETITIONER

	Page
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Questions Presented for Review	5
Statement	6
Proposition Number One	8-10
Argument and Authorities under Proposition Number One	10
Proposition Number Two	27
Argument and Authorities under Proposition Number Two	27
Proposition Number Three	33
Argument and Authorities under Proposition Number Three	33
Conclusion	43

CITATIONS

CASES:

<i>Alaska Steamship Co. v. Pettersen</i> , 205 F.2d 478, 347 U.S. 496, 74 S.Ct. 601, 98 L.Ed. 798	10, 37, 38, 42
<i>Arizona, The</i> , 298 U.S. 110, 123, 56 S.Ct. 707, 711, 80 L.Ed. 1075; 247 U.S. 372, 38 S.Ct. 501	21, 25
<i>Arizona v. Anelich</i> , 298 U.S. 124, 56 S.Ct. 712	13, 15, 25
<i>Art Metal Construction Co. v. Lehigh Structural Steel Co.</i> , 116 F.(2d) 57	30
<i>Balado v. Lykes Bros. Steamship Co., Inc.</i> , 179 F.(2d) 943	42
<i>Baltimore & Ohio Ry. Co. v. Jackson</i> , 353 U.S. 325, 77 S.Ct. 842	25

	Page
<i>Baltimore S.S. Co. v. Phillips</i> , 274 U.S. 316, 47 S.Ct. 600, 71 L.Ed. 1069	10, 13
<i>Beadle v. Spencer</i> , 298 U.S. 124, 56 S.Ct. 712, 80 L.Ed. 1082	17
<i>Bentley v. Albatross Steamship Co.</i> , 203 F.(2d) 270	36
<i>Brady v. Roosevelt S.S. Co.</i> , 317 U.S. 575, 63 S.Ct. 425, 87 L.Ed. 471	31
<i>Brown v. Western Railway of Alabama</i> , 338 U.S. 294, 70 S.Ct. 105	11
<i>Campbell v. Tidewater Associated Oil Co.</i> , 1956 A.M.C. 1377 p. 1379-80, 141 F.Supp. 431	35
<i>Carlisle Packing Co. v. Sandanger</i> , 259 U.S. 255, 42 S.Ct. 475, 66 L.Ed. 927	41
<i>Central Vermont R. Co. v. White</i> , 238 U.S. 507, 35 S.Ct. 865	21
<i>Chelentis v. Luckenbach S.S. Co.</i> , 247 U.S. 372, 384, 38 S.Ct. 501, 503, 62 L.Ed. 1171	13n, 21
<i>Chicago, Burlington & Quincy Ry. Co. v. United States</i> , 220 U.S. 580, 31 S.Ct. 617	24
<i>Commonwealth of Pennsylvania v. Nelson</i> , 350 U.S. 497, 76 S.Ct. 477	29
<i>Cortez, Admn. v. Baltimore Insular Line</i> , 287 U.S. 367, 53 S.Ct. 173, 77 L.Ed. 368	29
<i>Cosmopolitan Shipping Co. v. McAllister</i> , 337 U.S. 783, 69 S.Ct. 1317	31
<i>Cox v. Roth</i> , 348 U.S. 207, 75 S.Ct. 242	3, 10, 12, 14
<i>Crawford v. Pope & Talbot</i> , 206 F.(2d) 784	36
<i>Delk v. St. Louis & San Francisco Ry. Co.</i> , 220 U.S. 580, 31 S.Ct. 617	24
<i>Engel v. Davenport</i> , 271 U.S. 33, 46 S.Ct. 271, 70 L.Ed. 813, 220 Pac. 710	10, 11, 15, 23
<i>Erie v. Tompkins</i> , 304 U.S. 64, 58 S.Ct. 817	28
<i>Finley v. United States</i> , 244 F.(2d) 125	31
<i>Fisher v. Pace</i> , 336 U.S. 155, 69 S.Ct. 425	3n
<i>Gardner v. Panama Ry. Co.</i> , 342 U.S. 29, 76 S.Ct. 12	30
<i>Garrett v. Moore-McCormack Co., Inc.; et al.</i> , 317 U.S. 239, 63 S.Ct. 246	11, 19, 20, 21, 27, 40
<i>German v. Carnegie Illinois Steel Corp.</i> , 156 F.(2d) 977, cert. den.	26

<i>Grillea v. United States</i> , 232 F.(2d) 919 (C.C.A. 2d 1956)	37
<i>Hust v. Moore-McCormack Lines, Inc.</i> , 328 U.S. 707, 66 S.Ct. 1218, 90 L.Ed. 1534	31
<i>Just v. Chambers, et al.</i> , 312 U.S. 687, 61 S.Ct. 687	23
<i>Keen v. Overseas Tankship Corp.</i> , 194 F.(2d) 515, cert. den., 343 U.S. 966, 72 S.Ct. 1061, 96 L.Ed. 1363	36
<i>Lauro v. United States</i> , 162 F.(2d) 32	36
<i>LeGate, John F., v. SS Panamolga</i> , 221 F.(2d) 689	30, 33
<i>Lilly v. Grand Trunk Railway</i> , 317 U.S. 481	24
<i>McCarthy v. American-Eastern Corp.</i> , 175 F. (2d) 724, cert. den. 338 U.S. 939, 70 S.Ct. 144	26
<i>Mahnich v. Southern S.S. Co.</i> , 321 U.S. 96, 64 S.Ct. 455	36, 37
<i>Manhat v. United States</i> , 220 F.(2d) 143, at p. 148 (2 C.A.) cert. den., 349 U.S. 966	36
<i>Markham v. Cabell</i> , 326 U.S. 404, 409	26
<i>Mullen v. Fitz Simons & Conwell Dredge & Dock Co.</i> , 172 F.2d 60, cert. den. 337 U.S. 959, 69 S.Ct. 1534	26
<i>Norfolk Southern Railroad Company v. Walter G. Ferebee</i> , 228 U.S. 269, 35 S.Ct. 781	41
<i>Oakes v. Graham Towing Company</i> , 1955 A.M.C. p. 1824, 135 F.Supp. 485	36
<i>O'Donnell, Admn. v. Elgin, Joliet & Eastern Ry. Co.</i> , 338 U.S. 384, pps. 390-391, 70 S.Ct. 200	24
<i>Panama Agencies Co. v. Franco</i> , 5 Cir., 111 F. (2d) 263, 266	13n
<i>Panama R. Co. v. Gardner</i> , 342 U.S. 29, 72 S.Ct. 16, 96 L.Ed. 31	29
<i>Panama R. Co. v. Johnson</i> , 264 U.S. 375, 387, 388, 44 S.Ct. 391, 394, 68 L.Ed. 748	10, 13n, 21, 23
<i>Panama Refining Co. v. Vasquez</i> , 271 U.S. 557, 560, 561, 46 S.Ct. 596, 597, 70 L.Ed. 1085	13n
<i>Pats v. Standard Dredging Corp. (5th Cir.)</i> , 193 F.(2d) 498	26
<i>Poignant v. U. S.</i> , 225 F.(2d) 595	42
<i>Pope & Talbot v. Hawn</i> , 198 F.(2d) 800, 346 U.S. 406, 74 S.Ct. 202	36, 38, 39

<i>Ran v. Atlantic Refining Co.</i> , 87 F.Supp. 853,	17
<i>Seas Shipping Co. v. Sieracki</i> , 149 F.(2d) 98, 328 U.S. 85, 66 S.Ct. 872	10, 12, 36, 41
<i>Secondbee; The</i> , 102 F.(2d) 577, p. 581	36
<i>Sellon v. Great Lakes Transit Corp. (The H. A. Scandrett)</i> (CCA 2nd Cir.), 87 F.2d 708	36
<i>Southern Pacific Company v. Jensen</i> , 244 U.S. 205, 37 S.Ct. 524	21
<i>St. Louis I. M. & S. R. Co. v. Taylor</i> , 210 U.S. 281, 28 S.Ct. 616	11, 24
<i>Troupe v. Chicago D. & G. Bay Transit Co.</i> , 234 F.(2d) 253	33
<i>United States v. Alex Dussel Iron Works, Inc.</i> , 31 F.(2d) 535	30
<i>United States v. Smith</i> , 220 F.(2d) 548	36
<i>Walker v. Benjamin Foster</i> , 92 F.Supp. 402, 1950 A.M.C. 1813	30
<i>Warner v. Goltra</i> , 293 U.S. 155, 156, 162, 55 S.Ct./ 46, 49, 79 L.Ed. 254	21

UNITED STATES STATUTES:

Title 28 U.S.C.A., Sec. 41(3)	13n
Title 28 U.S.C.A., Sec. 1257(3)	2
Title 42 U.S.C.A., See. 249	24
Title 45 U.S.C.A., Sec. 51, et seq.	2, 24
Title 45 U.S.C.A., Sec. 54	2
Title 45 U.S.C.A., Sec. 56 (1939 amendment)	3, 5,
	12, 15
Title 45 U.S.C.A., Sec. 745	31
Title 45 U.S.C.A. (27 Stat. at L 531-1-16)	24
Title 46 U.S.C.A., Sec. 688, et seq.	2, 12, 15, 18, 25
Federal Rules of Civil Procedure, Rule 49	37

TEXAS RULES AND STATUTES:

Texas Rules of Civil Procedure, Rules 273, 274, 277, 285, 286	3, 4
Vernon's Civil Statutes of the State of Texas, Art. 1913	30
Vernon's Civil Statutes of the State of Texas, Art. 5256	5

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 83

RICHARD McALLISTER,

Petitioner,

vs.

MAGNOLIA PETROLEUM COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE
FIFTH SUPREME JUDICIAL DISTRICT

BRIEF ON THE MERITS FOR
PETITIONER, RICHARD McALLISTER

Opinions Below

The judgment of the District Court of Dallas County, Texas, rendered on the 25th day of April, 1955 (R. 381).

The opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District, rendered on the 1st day of March, 1956 (R. 421-436), and is reported in 290 S.W. (2d) 313.

Jurisdiction

This cause is presently before the Court on a writ of certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District at Dallas, Texas, granted by this Court on the 25th day of February, 1957. The petition for the writ was timely filed within ninety (90) days from October 3, 1956, the date on which Petitioner's Application for Rehearing was denied by the Supreme Court of Texas, the highest court of Texas in which a decision herein could be had. The jurisdiction of this Court rests upon Title 28 U.S.C.A. Sec. 1257(3).

Statutes Involved

The statutes involved are the Jones Act, 46 U.S.C.A., Sec. 688, et seq., reading as follows:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action *all statutes* of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply * * *" (all emphases ours.)

and the Federal Employers' Liability Act, 45 U.S.C.A., Sec. 51, et seq., reading in part as follows:

"Every common carrier by railway while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of death of such employee * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any

defect or insufficiency, due to its negligence, in its *** equipment***."

"That in any action brought *** by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employees shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of its officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risk of his employment in any case where the violation *** of any statute enacted for the safety of employees contributed to the injury or death of such employee." Sec. 54.

The Federal Employers' Liability Act further provides as follows:

"No action shall be maintained under this chapter unless commenced within three years from the date the cause of action occurred." Sec. 56 (1939 Amendment). This amendment has been held applicable to seamen's actions, *Cox v. Roth*, 348 U.S. 207.

Texas Rules of Civil Procedure provide:¹

Rule 273:

"*** The judge shall so frame his charge as to distinctly separate questions of law from questions of fact, and not therein comment on the weight of the evidence, and so as to instruct the jury as to the law arising on the facts, and shall only submit controverted questions of fact."

¹ In our Texas Rules of Civil Procedure the jury simply finds the facts by answering the issues submitted to them, and they must never be advised of the effect of their answers to the questions or the effect their verdict may have upon the final judgment. Texas Rules of Civil Procedure, Rules 273 through 286. *Fisher v. Pace*, 69 S.Ct. 425, 336 U.S. 155.

Rule 274:

"A party objecting to a charge must point out distinctly the matter to which he objects and the grounds of his objection."

Rule 277:

*** In submitting special issues the court shall submit such explanatory instructions and such definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict on such issues, and in such instances the charge shall not be subject to the objection that it is a general charge."

Rule 285:

"The jury may communicate with the court by making their wish known to the officer in charge, who shall inform the court, and they may then in open court, and through their foreman, communicate with the court, either verbally or in writing. If the communication is to request further instructions, Rule 286 shall be followed."

Rule 286:

"After having retired, the jury may receive further instructions of the court touching any matter of law, either at their request or upon the court's own motion. For this purpose they shall appear before the judge in open court in a body, and if the instruction is being given at their request, they shall through their foreman state to the court, in writing, the particular question of law upon which they desire further instruction. The court shall give such instruction in writing, but no instruction shall be given except in conformity with the rules relating to the charge. Additional argument may be allowed in the discretion of the court."

Questions Presented for Review

1. Is a seaman, who suffers personal injuries in the course of his employment by reason of unseaworthiness of the vessel or of its appliances, bound by the two year statute of limitation prevailing in the state where the cause of action was instituted, Vernon's Civil Statutes of Texas, Art. 5256, or is the three year statute of limitation enacted by Congress controlling? Title 45, U.S.C.A., Sec. 56.
2. In view of Congressional enactment of a three year limitation statute in seamen's actions for personal injuries, does not the state court's imposition of its own limitation statute impair and destroy the uniform application of the maritime rights and duties throughout the nation?
3. May a state court by its practice and procedure substantially alter or deny the rights of the litigant as those rights are established in federal law?
4. Whether the trial court's submission of issues numbers 3 and 14 and definitions of unseaworthiness (R. 359 and 362) effectively denied petitioner's right to recovery under the seaworthy doctrine.
5. If any analogy to a statute of limitation is to be followed in a seaman's case for personal injuries sustained by him during the course of his employment, should not the three year period of limitation enacted by Congress control rather than the shorter limitation period of the state in which the cause of action is brought?

Statement

On the 27th day of August, 1953, and within three years of October 19, 1950, Petitioner filed his suit against this employer in the district court of Harris County, Texas, which was removed to the district court of Dallas County, Texas, pursuant to Respondent's plea of privilege, seeking compensatory damages for personal injuries sustained on October 19, 1950. Petitioner, an engineer, and a member of the crew of the M/V J. C. Stephens, owned and operated by Respondent, alleged that, while the vessel was on navigable waters of the United States, because of Respondent's negligence and the unseaworthy condition of the windows over the stairs leading from the lounge to the galley and the deck above the galley, water came through said port-holes, or windows, and through the deck onto the stairs he was thereby caused to fall, sustaining injuries. The Log Book entry substantiated Petitioner's version of the occurrence (R. 345).

Petitioner reported the injury but continued working sporadically with intermittent back pains in varying degrees of severity. He was treated by a physician from time to time; and, finally, some two years later was examined by a Doctor Battalora, a specialist in orthopedics (R. 41), at New Orleans, Louisiana, who then diagnosed Petitioner's condition as serious, painful and disabling injuries to his back designated as one or more herniated nucleus pulposis (ruptured discs in between the vertebrae). Because of Petitioner's continued difficulties and pain in his back which caused him finally to be unable to discharge his duties as a seaman aboard the employer's vessel, or vessels, on the 6th day of July, 1953, Respondent gave him a certificate entitling him as an injured seaman, to enter the United States Public Health Service facilities (Marine Hospital, Galveston, Texas). After being discharged from the hospital he consulted an attorney and this suit was filed.

At the conclusion of the evidence before a jury, the trial judge submitted Special Issues, as required by the Texas Rules of Civil Procedure, consisting of specific issues raised by the pleadings and the evidence. The jury in response to such issues found:

- (A) That Petitioner received an injury to his body while attempting to walk down the stairs leading from the lounge to the galley (Issue No. 1) (R. 358)
- (B) That the portholes over said stairs (Issue No. 2) (R. 359), and
- (C) The deck above the galley (Issue No. 13) (R. 362) were not watertight.

Petitioner contended that such findings constituted, as a matter of law, unseaworthiness of such windows, or portholes, and of said deck above the galley, and that such issues should have been followed by issues inquiring of the jury whether such conditions proximately caused Petitioner's injuries.

Over timely objections by Petitioner's counsel, in conformity with the Texas Rules of Civil Procedure (R. 370-374), the Court improperly and in denial of Petitioner's federally created rights did not submit to the jury whether the failure to have watertight windows, or portholes, over the stairs and watertight decks proximately caused his injuries, but instead submitted Special Issues 3 (R. 359) and 14 (R. 362) which asked the jury to find whether or not these conditions, lack of watertight portholes and water-tight deck, made "the crew ship" in question unseaworthy. In connection with such issues (3 and 14) the Court instructed the jury that to constitute unseaworthiness, each of these conditions stated separately must render

"The vessel not reasonably fit for the purpose for which it was being used."

The submission of Special Issues Numbers 3 and 14 placed a greater burden upon Petitioner than the one required by the applicable Federal Law in that Issues numbers 3 and 14 and the definition of unseaworthiness were so worded that the jury had to believe, and Petitioner was required to prove that the failure to have watertight port-holes and deck made the ship unfit to navigate upon the Gulf of Mexico or on other navigable waters at the time of Petitioner's injuries. So unreasonable, confusing and improper were Issues numbers 3 and 14, and the definition, that the jury, in an obvious effort to understand such issues, within fifteen minutes after retirement to consider their verdict, requested the Court to clarify the issues by sending out, in writing, the following inquiry (R. 419):

"Judge Long: In Special Issue No. 3 is the term 'unseaworthy' referring to the vessel as a whole, or the three windows on the portside?"

Signed James H. Brown, Foreman.

Petitioner then requested the Court to answer the jury's inquiry and submitted to the Court an answer in writing as follows:

"In reply to your question, you are instructed that the term 'unseaworthy' as given to you in connection with Special Issue No. 3 refers to the three windows on the port side" (R. 420).

The Court refused to reply to the jury's inquiry, refused to submit Petitioner's requested answer, and instead sent to the jury the following reply (R. 420):

"The Court's charge contains definitions and instructions. The Court can instruct you no further."

In view of the Court's instructions and its refusal to answer the jury's most intelligent and cogent question, the jury in order to answer Issues Numbers 3 and 14 affirmatively (in favor of Petitioner) had to believe that these conditions inquired about in Issues 2 and 13 rendered the vessel *as a whole* unseaworthy for the use to which it (the vessel) was being put.. If there is any doubt about the trial court having reference to the ship as a whole, such doubt is dispelled in the proximate cause Issues Numbers 4 (R. 359) and 15 (R. 362), since it particularly calls the jury's attention to the unseaworthiness of "the crew ship" in question. Since no contention was made, nor proof offered that the vessel was unable to navigate upon the Gulf of Mexico or other navigable waters simply because the windows over the stairs leading from the lounge to the galley and the deck above the galley were not watertight, the jury had no alternative but to answer Special Issues 3 and 4 in the negative, i.e., that these conditions did not make the vessel *as a whole* unseaworthy. The issues of proximate cause (Issues 4 and 15, R. 359 & 362) being conditioned upon an affirmative answer to Issues 3 and 14, were not answered. Thus, Petitioner was denied

- (a) His constitutional right to a jury trial on the proximate cause issues, and
- (b) His right under the applicable Federal Law to compensatory damages on account of the failure to furnish watertight windows (unseaworthy conditions) which proximately caused his injuries.

In answer to the damage Issue No. 34 (R. 367), the jury found Petitioner to have been damaged in the sum of Thirty-two Thousand Five Hundred Dollars (\$32,500.00). The jury absolved the defendant of negligence, but notwithstanding the finding of unseaworthiness, i.e., windows over the stairs leading from the lounge to the galley and

the deck above the galley not being watertight, the Court entered judgment for Respondent denying Petitioner compensatory damages. From this judgment Petitioner took an appeal to the Court of Civil Appeals.

The Court of Civil Appeals affirmed the judgment of the trial court without considering any of the questions presented but sustained the trial court's judgment denying compensatory damages on the ground that the two year Texas limitation statute applied (R, 421) in an action where a seaman sues for injuries sustained in the course of his employment by reason of unseaworthiness.

PROPOSITION NUMBER ONE

A seaman who suffers personal injuries in the course of his employment by reason of unseaworthiness of the vessel or its appliances or by reason of negligence is not bound by the two year statute of limitation of the state wherein the cause of action is brought but the three year limitation statute enacted by Congress controls.

Argument and Authorities

This case brings before this Court a most important question of law never directly passed on by this Court. The Texas Court of Civil Appeals ruled that the statute of limitation of the state wherein the cause of action is instituted controls rather than the limitation statute enacted by Congress. The question however was especially left open in *Engel v. Davenport*, 46 S.Ct. 410, 271 U.S. 33, 70 L.Ed. 813, and we submit contrary to the decisions of this Court in *Cox v. Roth*, 75 S.Ct. 242, 348 U.S. 207 (5th Cir.), *Baltimore Steamship Co. v. Phillips*, 274 U.S. 316, 47 S.Ct. 600, 71 L.Ed. 1069, *Panama Railway Co. v. Johnson*, 44 S.Ct. 391, 294 U.S. 375; *Seas Shipping Co. v. Sieracki*, 149 F.2d 98, 328 U.S. 85, 66 S.Ct. 872, and *Alaska Steamship Co. v.*

Petterson, 205 F.2d 478, 347 U.S. 496, 74 S.Ct. 601, 98 L.Ed. 798.

In this case the court has before it two primary and important questions:

- (1) To determine the proper period of limitation in a case such as this; and,
- (2) May a state by its practice alter or deny the federally created right of a litigant.

Since *Engel v. Davenport, supra*, specifically left the first question open it is now before this Court for a specific answer. The second question this Court has specifically answered it in *Garrett v. Moore-McCormack Co., Inc., et al.*, 63 S.Ct. 246, 317 U.S. 239; holding that a state may not by its practice alter or deny the rights of such litigant stating as follows:

"If by its practice the state court were permitted substantially to alter the rights of either litigant, as these rights were established in Federal Law, the remedy afforded by the state would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less, but more secure."

Other cases by this court reiterating this established principle are *Brown v. Western Railway of Alabama*, 338 U.S. 294, 70 S.Ct. 105; *St. Louis I. M. & S. R. Co. v. Taylor*, 210 U.S. 281, 28 S.Ct. 616.

The Texas Court of Civil Appeals misconceived the broad principles of the Jones Act—not only as written but as interpreted by many decisions of this Court. The act reads as follows:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election,

maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * * " Title 46, Sec. 688, U.S.C.A.

Section 56, Title 45 U.S.C.A. (Railway Employees' Act) reads as follows:

"No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." (1939 Amendment.)

This section has been held applicable to seaman's suit for personal injuries. *Cox v. Roth*, 348 U.S. 207.

Since the passage of the Jones Act, there is no decision in the books, until the Texas Court of Civil Appeals in this case, which holds that a *seaman*, injured during the course of his employment, whether through negligence or unseaworthiness, must file his suit within the period of the limitation statute of *the state* wherein the cause of action is brought. On the contrary, all the decisions hold the benefits conferred on seamen under the Jones Act are equally applicable to the pre-existing causes of action under the General Maritime Law, just as the benefits a seaman had under the Maritime Law, became a part of the provisions of the Jones Act. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872. On page 874 this Court stated:

"At the outset we may dismiss the first contention. It is now well settled that a right peculiar to the law of admiralty may be enforced either by a suit in admiralty or by one on the law side of the court. *Carlisle Packing Co. v. Sandager*, 259 U.S. 255, 259, 42 S.Ct. 475, 476, 66 L.Ed. 927; *Garrett v. Moore-McCormack*

Co., 317 U.S. 239; Rhones v. Socony-Vacuum Oil Co., 37 F.Supp. 616."²

So intermingled are these rights that the failure to assert one in a cause of action for personal injuries based on either negligence or unseaworthiness forever bars the seaman from asserting the other in a separate or subsequent cause of action. *Baltimore Steamship Company v. Phillips*, 47 S.Ct. 600, 274 U.S. 316, 71 L.Ed. 1068. Indeed, the very language of Section 688 clearly indicates such intention since said Section does not deal only with rights but also with remedies, thus:

"Any seaman who suffers personal injuries in the course of his employment, etc., and * * * in such action all statutes of the United States modifying or extending the common-law rights or remedy in cases of personal injury to railway employees shall apply."

It is to be noted the statute does *not* say—Any seaman who shall suffer a personal injury in the course of his employment by reason of negligence. Nothing in this statute limits recovery only upon a showing of negligence, nor can it conceivably be interpreted to mean that this right to sue for negligence is not in addition to the rights theretofore enjoyed by seamen. *Arizona v. Anelich*, 56 S.Ct. 712,

² Nothing in 28 U.S.C.A. Sec. 41(3) is to the contrary. The section provides that federal district courts shall have jurisdiction "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it * * *." This does not mean that where suit is brought at law the court is restricted to the enforcement of common-law rights. *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 384, 38 S.Ct. 501, 503, 62 L.Ed. 1171; *Panama R. Co. v. Johnson*, 264 U.S. 375, 387, 388, 44 S.Ct. 391, 394, 68 L.Ed. 748; *Panama Refining Co. v. Vasquez*, 271 U.S. 557, 560, 561, 46 S.Ct. 596, 597, 70 L.Ed. 1085, "When a cause of action in admiralty is asserted in a court of law its substance is unchanged." *Panama Agencies Co. v. Franco*, 5 Cir., 111 F.2d 263, 266.

298 U.S. 124, hold that the Act is to be liberally construed, and is to be interpreted in harmony with the established doctrine of maritime law *of which it is an integral part.*

It is submitted that the answer to the first question can be found in *Cox v. Roth*, 216 F.2d 76 (5th Cir.), affirmed 75 S.Ct. 242, 348 U.S. 207. The *Cox* case involved a Florida limitation statute applicable against estates of decedents which, under the Florida law, was six months. The lower court held such statute applicable and dismissed the suit.

"In *Lindgren v. United States*, *supra* [281 U.S. 38, 50 S.Ct. 211], the court made these pertinent observations in reference to the Jones Act. It establishes as a modification of the prior maritime law a rule of general application in reference to the liability of the owners of vessels for injuries to seamen extending territorially as far as Congress can make it go; that this operates uniformly within all of the States * * *; and that, as it covers *the entire field of liability for injuries to seamen*, it is *paramount and exclusive*, and *supersedes the operation of all state statutes dealing with that subject.*'"

Judge Hutcheson, in his dissent, states:

"We take it to be now well settled that when a common law action is brought, whether in a federal or in a state court, to enforce a right peculiar to the law of admiralty, the substantive law to be applied is the same as would be applied by an admiralty court. *Chelentis v. Luckenbach S.S. Co., Inc.*, 247 U.S. 372, 38 S.Ct. 501, 503, 62 L.Ed. 1171, * * * and other cases."

This Court in affirming the 5th Circuit decision, 75 S.Ct. page 242, 348 U.S. 207, in discussing the applicability of

the three year limitation statute, Sec. 56, Title 45 U.S.C.A. said:

"* * * Rather, it means that those contingencies against which Congress has provided to ensure recovery to railroad employees should also be met in the admiralty setting."

By "admiralty setting" the Court could not have meant anything else but causes of action cognizable in admiralty as applicable to seamen, which by necessity includes a cause of action for unseaworthiness.

This Court further said:

"The process of interpretation also misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve."

The only case brought by a seaman in which the precise question here was ever raised or discussed is *Engel v. Davenport*, 46 S.Ct. 410, 271 U.S. 33, 70 L.Ed. 813. Engel, a seaman, brought an action at law against the shipowner to recover damages for personal injuries suffered aboard a vessel in April, 1951. The suit was brought within the then existing two year period of limitation prescribed by the Jones Act. Davenport demurred to the complaint on the ground that the cause of action was barred by the California one year limitation statute, which the trial court sustained. The Supreme Court of California affirmed, 220 Pac. p. 710. Engel brought certiorari, contending that the suit, founded, as it was, on Section 33 of the Merchant Marine Act, Title 46, Sec. 688, U.S.C.A., under which state courts were given concurrent jurisdiction, was timely filed, insisting that Section 56 of Title 45 incorporated in the provisions of the Merchant Marine Act provided that a

seaman's suit for personal injuries could be commenced within the then existing two-year limitation statute, irrespective of state statutes. This Court reversed the California court, stating as follows:

"It is settled by the decision in *Panama Railroad v. Johnson*, 44 S.Ct. 391, 264 U.S. 375, 68 L.Ed. 748, that Section 33 of the Merchant Marine Act is an exercise of the power of Congress *to alter or supplement the maritime law by changes that are country-wide and uniform in operation*; That it brings *into the maritime law* new rules drawn from the Employer's Liability Act and its amendments—adopted by the generic reference to 'all statutes of the United States modifying or extending the common law *right or remedy* in cases of personal injuries to railway employees' and 'extends to injured seamen a right to invoke at their election, either the relief accorded by the old rules or that provided by the new rules'; * * *

"The present suit is not brought merely to enforce the liability of the owner of the vessel to indemnity for injuries caused by a defective appliance, without regard to negligence, for which an action of law could have been maintained prior to the Merchant Marine Act. *Carlisle Packing Co. v. Sandanger*, 42 S.Ct. 475, 259 U.S. 255, 66 L.Ed. 927; and we need not determine whether if it had been thus brought under the old rules, the state statute of limitations would have been applicable."

This Court left this specific question open, and there are no decisions holding that seamen suing their employers for personal injuries caused by reason of unseaworthiness must do so within the limitation period of the state wherein the cause of action is brought. True, there are a number of

cases holding that longshoremen bringing third party actions against a shipowner for unseaworthiness and/or negligence must do so within the limitation period of the state wherein the cause of action is brought, but there the necessary element of employer-employee relationship required by Section 688 is absent. Therefore, cases in which longshoremen are involved are not helpful, nor applicable.

In *Ran v. Atlantic Refining Co.*, 87 F.Supp. 853, the Court held that a cause of action for personal injuries by reason of unseaworthiness may be brought within three years, stating as follows:

"A breach of the duty to provide a seaworthy vessel manned by a competent crew occurs when a seaman is injured as a result of unseaworthiness or negligence. In the instant case, the plaintiff's right to damages for personal injuries suffered from this breach of this duty arose in July or August of 1944 but was extinguished forever in July or August of 1947."

While this Court has not squarely passed on this question of limitation, there are numerous decisions holding that the Jones Act cannot be used to restrict seamen's rights, that the public policy of the United States as expressed by Congressional intent was to enlarge those rights and to draw into the Act, and make part of such Act the rights theretofore enjoyed by the seaman. See *Arizona v. Anelich*, 56 S.Ct. 707, 298 U.S. 110, 80 L.Ed. 1075, and *Beadle v. Spencer*, 56 S.Ct. 712, 298 U.S. 124, 80 L.Ed. 1082.

In the *Arizona v. Anelich* case, *supra*, the employer-shipowner contended that where a seaman sued under the Jones Act, incorporating as it does the Federal Employers' Liability Act, the employer-shipowner (prior to the 1939 amendment abolishing the defense of assumption of risk) might interpose the defense of assumption of risk. The

employer's contention being, since the Jones Act did not specifically abolish the defense of assumption of risk, even though under the General Maritime Law it is not a defense, a seaman who chose to proceed under the Jones Act, like any other litigant under the Federal Employers' Liability Act, subjects himself to the employer's defense of assumption of risk. This Court rejected such contention on the ground that the rights and remedies which a seaman has under the old Admiralty Rules were enlarged and became a part of these new rules of the Jones Act and became an integral part of the Act, stating as follows:

"Like considerations, and others to be mentioned, require a like conclusion with respect to the modified and in some respects enlarged liability imported unto the maritime law by the Jones Act. The legislation was remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge the protection, not to narrow it. Cf. *Chelentis v. Luckenbach S.S. Co.*, *supra*. Its provisions, like others of the Merchant Marine Act (41 Stat. 988), of which it is a part, are to be liberally construed to attain that end. See *Cortes v. Baltimore Insular Lines*, 287 U.S. 367. * * * and are to be interpreted in harmony with the established doctrine of maritime law of which it is an integral part."

To hold that a seaman may bring a cause of action grounded in negligence within three years under a Federal statute, but that one grounded on unseaworthiness must be brought within the time prescribed under a state statute, which in Texas is two years, would destroy the uniformity of the application of the Maritime Law; destroy the remedy specifically provided for by Congress in Section 688, Title 46, and make a judicial chameleon of the substantive rights of seamen, changing its color in accordance with the geo-

graphical location in which the suit is brought, contrary to *Garrett v. Moore-McCormack Co., Inc.*, 63 S.Ct. 246, 317 U.S. 239, 87 L.Ed. 239. In that case, the court said that when procedural matters tend to negate or destroy a federally created right such procedure will not be followed to create such a result, stating (p. 249):

"We do not have in this case an effort of the state court to enforce rights claimed to be rooted in state law. The petitioner's suit rested on asserted rights granted by federal law and the state courts so treated it. Jurisdiction of the state court to try this case rests solely upon Sec. 33 of the Jones Act and upon statutes traceable to the Judiciary Act of 1780 which in 'all civil causes of admiralty and maritime jurisdiction' saves to suitors 'the right of common law remedy where the common law is competent to give it.' These statutes authorize Pennsylvania courts to try cases coming within the defined category. Whether Pennsylvania was required by the acts to make its courts available for those federal remedies, or whether it could create its own remedy as to maintenance and cure based on local law, we need not decide; for having voluntarily opened its courts to petitioner, the questions are whether Pennsylvania was thereupon required to give to petitioner *the full benefit of federal law* and if so whether it failed to afford that benefit."

"There is no dearth of example of the obligation on law courts which attempt to enforce substantive rights arising from admiralty law to do so in a manner conforming to admiralty practice. Contributory negligence is not a barrier to a proceeding in admiralty or under the Jones Act, and the state courts are required to apply this rule in Jones Act actions. * * *

"It must be remembered that the state courts have concurrent jurisdiction with the federal courts to try

actions either under the Merchant Marine Act or in personam such as maintenance and cure. The source of the governing law applied is *in the national*, not the state, governments. IF BY ITS PRACTICE THE STATE COURT WERE PERMITTED SUBSTANTIALLY TO ALTER THE RIGHTS OF EITHER LITIGANT, AS THOSE RIGHTS WERE ESTABLISHED IN FEDERAL LAW, THE REMEDY AFFORDED BY THE STATE WOULD NOT ENFORCE, BUT WOULD ACTUALLY DENY, FEDERAL RIGHTS WHICH CONGRESS, BY PROVIDING ALTERNATIVE REMEDIES, INTENDED TO MAKE NOT LESS, BUT MORE SECURE. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. ***

"And admiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State. So here, in trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected."

In the *Garrett* case, *supra*, the defendant, Moore McCormack Co., introduced in evidence an instrument signed by Garrett releasing all claims in the very cause of action sued upon. Garrett neither by pleading nor proof sought to overcome the effect of such release. The Court granted an instructed verdict because, under Pennsylvania practice, like Texas, the burden was on the plaintiff to overcome the consequences of his release. Strictly a procedural matter, yet, this Court reversed the Pennsylvania Court holding that by such procedural matter substantive rights

of the seamen had been denied. The Court said that, in conformity with federal procedure applicable to such cases, the burden was upon the person who interposed the defense of a release to prove that it was fairly entered into.

Moreover, in the very same case, and in many cases prior to and since the *Garrett* case, the Supreme Court has held that the old maritime rules and the Jones Act are to be liberally construed to carry out their full purpose, which was to enlarge admiralty's protection to its wards. *Warner v. Goltra*, 293 U.S. 155, 156, 162, 55 S.Ct. 46, 49, 79 L.Ed. 254; *The Arizona*, 298 U.S. 110, 123, 56 S.Ct. 707, 711, 80 L.Ed. 1075.

Other cases in which the Court has held that states' procedural matters cannot be used to negate or destroy a federally created right are:

Central Vermont R. Co. v. White, 35 S.Ct. 865, 238 U.S. 507;

Southern Pacific Company v. Jensen, 37 S.Ct. 524, 244 U.S. 205;

Chelentis v. Luckenbach S.S. Co., 38 S.Ct. 501, 247 U.S. 372;

Panama R. Co. v. Johnson, 44 S.Ct. 391, 264 U.S. 375.

In *Panama R. Co. v. Johnson*, 264 U.S. 375, 44 S.Ct. 391, this Court stated as follows:

"After the decision (*Chelentis v. Luckenbach*) the section was re-enacted in the amended form hereinabove set forth as part of an act the expressed object of which was 'to provide for the promotion and maintenance of the American merchant marine.' In that form it makes applicable to personal injuries suffered by seamen in the course of their employment 'all statutes of the United States modifying or extending the

common-law right or *remedy* in cases of personal injury to railway employees.' Thus its origin, environment and subject matter show that it is intended to, and does, bring the rules to which it refers into the maritime law. * * *

"A more reasonable view consistent with the spirit and the purpose of the statute as a whole, is that the words are used in the sense of 'an action to recover damages for such injuries,' the emphasis being on *the object of the suit* rather than the jurisdiction in which it is brought.

"The statute is concerned with the relative rights and obligations of seamen and their employers arising out of personal injuries sustained by the former in the course of their employment. *Without question this is a matter which falls within the recognized sphere of the maritime law*, and in respect of which the maritime rules have differed materially from those of the common law applicable to injuries sustained by employees in nonmaritime service. But, as Congress is empowered by the constitutional provision to alter, qualify or supplement the maritime rules, there is no reason why it may not bring them into relative conformity to the common-law rules or some modification of the latter, *if the change be country-wide and uniform in operation*. Not only so, but the constitutional provision interposes no obstacle to permitting rights founded on the maritime law or an admissible modification of it to be enforced as such through appropriate actions on the common law side of the courts—that is to say, through proceedings *in personam* according to the course of the common law."

The Jones Act was passed in order to provide for the promotion and maintenance of the American Merchant

Marine. In that form it makes applicable to *personal injuries* suffered by seamen in the course of their employment all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees. Again, as stated by the Court in *Panama Ry. Co. v. Johnson*:

"Thus its origin, environment and subject-matter show that it is intended to, and does, bring the rules to which it refers *into the maritime law*. ***"

"The national legislation respecting injuries to railway employees engaged in interstate and foreign commerce which it adopts has a uniform operation, and neither is nor can be deflected therefrom by local views of common law rules."

This Court in *Just v. Chambers, et al.*, 61 S.Ct. 687, 312 U.S. 687 again liberally interpreted the Jones Act, stating as follows:

"With respect to maritime torts we have held that the state may modify or supplement the maritime law by creating liability which a court of admiralty will recognize and enforce when the state action is *not hostile to the characteristic features of the maritime law or inconsistent with federal legislation*."

In *Engel v. Davenport, supra*, the Court cites the decision of *Panama R. Co. v. Johnson*, stating as follows:

"It is settled by the decision in *Panama Railroad v. Johnson*, 44 S.Ct. 391, 264 U.S. 375, 68 L.Ed. 748, that section 33 of the Merchant Marine Act is an exercise of the power of Congress to alter or supplement the maritime law by changes that are country-wide and uniform in operation; that it brings into the maritime law new rules drawn from the Employers' Liability Act

and its amendments—adopted by the generic reference to ‘all statutes of the United States modifying or extending the common law right or remedy in cases of personal injuries to railway employees’.”

This Court has permitted a recovery for death under the Federal Employers’ Liability Act for the violation of the absolute duties created by the Safety Appliance Act and the Boiler Inspection Act. *O’Donnell, Admn. v. Elgin, Joliet & Eastern Ry.*, 338 U.S. 384, 70 S.Ct. 200, pages 390-394; *Lilly v. Grand Trunk Railway*, 317 U.S. 481, page 485. It is most difficult to find any difference between the absolute liabilities created by the Safety Appliance Act, the Boiler Inspection Act, and the absolute liability created by the General Maritime Law with respect to a vessel’s appliances.

The Safety Appliance Act was enacted in 1893 to take effect after January 1, 1898 (27 Stat. at L 531, 45 U.S.C.A. 1-16) long before the passage of the Federal Employers’ Liability Act, Title 45, Sec. 51, et seq., which was not enacted until 1909. Like unseaworthiness, the violation of the Safety Appliance Act imposes a species of liability without fault. This Court has held that railroad workers suing under the Federal Employers’ Liability Act can recover compensatory damages by showing a violation of the Safety Appliance Act, i.e., liability without fault. *St. Louis Iron Mountain & Southern Ry. Co. v. May Taylor*, 210 U.S. 281, 28 S.Ct. 616; *Chicago Burlington & Quincy Ry. Co. v. United States*, 220 U.S. 559, 31 S.Ct. 612; *Delk v. St. Louis and San Francisco Ry. Co.*, 220 U.S. 580, 31 S.Ct. 617. Other cases followed but it was not until *O’Donnell v. Elgin, Joliet & E. Ry. Co.*, 338 U.S. 384, 70 S.Ct. 200 that this Court finally swept away the confusion that might theretofore have existed and unequivocally declared that cases involving safety appliance violations are properly enforced.

through a suit under the Federal Employers' Liability Act even though not predicated upon negligence at all and that they need not be artificially forced into the mold of negligence actions. *Baltimore & Ohio Ry. Co. v. Jackson*, 77 S.Ct. 842. The opinion of the Court begins as follows:

"This is a suit for damages arising from an injury suffered by a section foreman of the petitioner while operating a motor car that was towing a push truck on petitioner's tracks. It was brought under the Federal Employers Liability Act, 45 U.S.C.A. 51; et seq. The sole question is whether such vehicles when used in the manner here are within the coverage of the Safety Appliance Acts."

It ought to be perfectly clear that if in a violation of the Safety Appliance Act which does not concern itself with negligence at all, causing damage or death, compensatory damages may be recovered for the consequences of such violation by a suit through the Federal Employers' Liability Act, which has been from time to time termed the "Negligence Statute" a cause of action for unseaworthiness may likewise be enforced through Section 688, Title 46, U.S.C.A. (Jones Act) which receives its breath from the provisions of the Federal Employers' Liability Act. It would be unrealistic to make a distinction between the two situations and contrary to the intent expressed by this Court in *Arizona v. Anelich* (247 U.S. 372, 384, 38 S.Ct. 501-503), which specifically holds that the Jones Act merely enlarged the liability which it imported into the maritime law.

"Its purpose was to enlarge the protection, not to narrow it. *Chelentis v. Luckenbach S.S. Co.*, supra. Its provisions, like others of the Merchant Marine Act (41 Stat. 988), of which it is a part, are to be liberally

construed to attain that end," citing *Cox v. Roth*, 348 U.S. 207, 53 S.Ct. 173,

in which this Court expressed the broad application of the Jones Act as follows:

"* * * Rather it means that those contingencies against which Congress has provided to insure recovery to railroad employees should also be met in the *Admiralty setting.*"

As stated in *Markham v. Cabell*, 326 U.S. 406, on page 409,

"The policy as well as the letter of the law is a guide to decision. Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes * * * The process of interpretation also misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve."

The law is settled that a cause of action for negligence may be joined with a cause for unseaworthiness. See:

McCarthy v. American-Eastern Corp., 175 F. (2d) 724, cert. den. 338 U.S. 939, 70 S.Ct. 144;

Mullen v. Fitz Simons & Connell Dredge & Dock Co., 172 F. (2d) 601; cert. den. 337 U.S. 959, 69 S.Ct. 1534;

Getman v. Carnegie-Illinois Steel Corp., 156 F. (2d) 977, cert. den.;

Pate v. Standard Dredging Corp. (5th Circuit), 193 F. (2d) 498.

In the *McCarthy* case, *supra*, the Court stated as follows:

"Prior to the passage of the Jones Act, unless there was diversity of citizenship a seaman was compelled

in the federal court to assert his cause of action for injuries in a suit in admiralty in which there was no jury trial. It was the purpose of the 'election' clause of the Jones Act, we think, to make certain that an injured seaman, instead of suing in admiralty, could at his option assert his cause of action for personal injuries in the federal court in an action of law regardless of diversity of citizenship, thereby obtaining the right to a jury trial in every case in which the injuries were serious enough to bring the claim within the jurisdictional amount of \$3,000.00 * * *".

The Opinion of the Honorable Court of Civil Appeals in effect restricts these rights by applying the shorter period of the state statute of limitations instead of following the three year statute enacted by Congress. Such decision destroys the uniform application of the maritime law, contrary to *Garrett v. Moore-McCormack Co.*, *supra*, and other cases decided by this Court.

PROPOSITION NUMBER TWO

Congress having enacted a three year limitation statute applicable to "any seaman who shall suffer personal injuries in the course of his employment has preempted the field, and if any analogy is to be followed the federal rather than the state statute is to govern.

Argument and Authorities

In any event Congress having enacted a statute providing a three year period of limitation within which seamen sustaining personal injuries during the course of their employment may file suit for compensatory damages, if there is to be any analogy, the three year period of limitation provided for in the Jones Act should be followed and not the

limitation period of the state wherein the cause of action is brought.

The authorities hereinabove cited that the application and administration of the maritime law and rights having their roots in the Constitution of the United States and the Federal Law, must be uniformly administered, apply with equal force to Proposition Number Two. It would be inconceivable to think that two seamen receiving personal injuries aboard the same vessel under the same circumstances, arising out of the same occurrence, one living in Texas with a two year limitation statute and one in New York with a three year limitation statute, both filing suits in their respective states where jurisdiction can be obtained against the same shipowner; both having been injured by reason of the unseaworthiness of the vessel, both having brought their cause of action some two and one-half years after the injury occurred, should receive different treatment because they live in different states. If the three year limitation period provided for in the Jones Act is held not to be applicable, neither by reason of its three year statutory provision nor by reason of its application by analogy under the doctrine of laches, a seaman injured in New York may recover but the one who lives in Texas may not even though both have absolute grounds for the application of the doctrine of laches rather than the harsh rule of limitation. This would make the administration of the rights of seamen injured by reason of a maritime tort dependent upon a geographical location within the United States, making the Courts judicial chameleons, changing their hues and colors with the topography of the area in which they find themselves, contrary to all legal pronouncements applicable to such a situation and the particularly condemnation of *Erie v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817.

Petitioner by trial amendment (R. 355) allowed by the court, pleaded facts excusing the delay and showing no

prejudice. We believe that the period of limitation provided for in the Jones Act is paramount and controlling; but even if not, then Congress, having acted in this field, announced the public policy of the United States, the limitation period enacted by Congress should be followed. *Commonwealth of Pennsylvania v. Nelson*, 350 U.S. 497, 76 S.Ct. 477. In this case, as a matter of law, the evidence completely overcomes any plea of laches or limitation. *Panama R. Co. v. Gardner*, 342 U.S. 29, 72 S.Ct. 12, 96 L.Ed. 31. If there ever has been a case where there is an excuse for delay, and where no prejudice resulted to Respondent by reason of any delay, this is the case. The facts show that after the injury of October 19, 1950, Petitioner sought medical aid, was unable to get it (R. 40 through 43), even though under the law Respondent was duty bound to furnish it. *Cortez, Adm. v. Baltimore Insular Line*, 287 U.S. 387, 53 S.Ct. 173, 77 L.Ed. 368. Respondent even refused to buy him a supporting brace and Petitioner had to buy it himself (R. 240 through 241). Petitioner was kept in Respondent's employ until August of 1953, when finally he had to be hospitalized (R. 241). At the trial of the case every single employee who was a member of the crew of the vessel at the time Petitioner was injured was present in Court and testified (R. 247 through 248).

Superintendent Rhodes' testified as follows:

"Q. The same employees who were employed on board the vessel on October 19, 1950, sometime prior to that time or shortly sometime thereafter, are still employed by the Magnolia Petroleum Company with the exception of Mr. McAllister?

A. That is correct, they are.

Q. So that all the people who may have knowledge or should have knowledge of the situation that existed in that area are still available in the employ of the employer at the present time?

A. Those members of the boat crew, certainly they are.

Q. They consist of Captain Dressel, Captain Rosson?

A: Yes.

Q. Mr. Ashton, the deckhand?

A. Yes, sir.

Q. And the other deckhand was who?

A. I don't remember exactly.

Q. Mr. Liskey?

A. I believe Mr. Liskey is still in our employ."

Under the authorities, laches and limitation would be no defense under these facts. This is especially so in Texas where we have a blended system of law and equity. Vernon's Annotated Civil Statutes, Texas. Art., 1913.³

Walker v. Benjamin Foster, 92 F.Supp. 402, 1950

A.M.C. p. 1813;

United States v. Alex Dussel Iron Works, Inc.,
31 F.2d 535;

John F. LeGate v. SS. Panamolga, 221 F. (2d) 689;

Art Metal Construction Co. v. Lekigh Structural Steel Co., 116 F. (2d) 57;

Gardner v. Panama Railway Co., 342 U.S. 29, 76 S.Ct. 12.

The authorities cited under Proposition Number One, we believe make it crystal clear that at least by analogy the limitation provided for in the Jones Act is applicable to the case at Bar. In any event, the State limitation statute may not be mechanically applied to a suit by a seaman

³ "Subject to the limitations stated in this chapter, the district court is authorized to hear and determine any cause which is cognizable by courts, either of law or equity, and to grant any relief which could be granted by said courts, or either of them."

injured by reason of unseaworthiness. *Finley v. United States*, 244 F. (2d) 125. In the *Finley* case suit was brought by a shipyard employee against the United States under the Clarification Act, Title 45, Sec. 745, extending the time limited by the suits in Admiralty Act for commencing suit against the United States to one year after December 13, 1950. In that case a longshoreman was injured on May 19, 1947. He employed some attorneys who began two actions in his behalf in May of 1948. These actions were brought against the wrong defendants and complaints were never filed. Claimant changed counsel who filed his action on November 30, 1949, in the Supreme Court of New York against the Marine Transport Lines, Inc., the then General Agents of the United States. That suit was brought against the Agent under authority of *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 63 S.Ct. 425, 87 L.Ed. 471, and *Hust v. Moore-McCormack Lines, Inc.*, 328 U.S. 707, 66 S.Ct. 1218, 90 L.Ed. 1534. This Court in *Cosmopolitan Shipping Company v. McAllister*, 337 U.S. 783, 69 S.Ct. 1317, held that a General Agent would not be liable for the acts of the civil-service master and crew employed by the United States. In order to correct this inequitable dilemma and to provide a remedy Congress passed the Clarification Act. That Act, among other things, required as a condition precedent to a suit against the United States that the suit improperly filed against a general agent to have been timely commenced and thereafter dismissed solely because improperly brought against any person engaged by the United States to manage or conduct the vessel. *Finley* commenced the actions in the Supreme Court of New York and was removed to the Federal District Court. The District Judge upon proof showing that the action against the general agent was not timely brought dismissed the suit. The Second Circuit reversed, stating that even though the suit against the agent was filed on the law side of the docket

and though not timely brought, nevertheless under Admiralty principles the harsh doctrine of limitation is not to be mechanically applied but the doctrine of laches controlled, stating as follows (p. 128):

"The facts involved in this appeal present a problem maritime in its nature. The applicability of admiralty principles compels us to test the timeliness of the general agent action not by an arbitrary enforcement of the statute of limitations, but rather by the equitable doctrine of laches. While the analogous statute of limitations may be used as a yardstick passage of time alone will not bar an action for a maritime tort if the delay is excusable and the defendant is not prejudiced thereby. *Kang v. U.S.S.R.*, 3 Cir., 1951, 189 F. (2d) 303, certiorari denied 1952, 342 U.S. 903, 72 S.Ct. 292, 96 L.Ed. 676; *Gardner v. Panama R. Co.*, 1951, 342 U.S. 29, 72 S.Ct. 12, 96 L.Ed. 31; *Czaplicki v. The Hoegh Silvercloud*, 1956, 351 U.S. 525, 76 S.Ct. 946, 100 L.Ed. 1387.

"When Congress made the timeliness of the action against the general agent a prerequisite to bringing suit against the United States under 46 U.S.C. Sec. 745, it raised the issue of laches in those cases in which the general agent's action was brought after the analogous statute of limitations had run. The disposition of the district court made it unnecessary for it to decide the question of laches. It is our opinion that the presence or absence of laches in the action against *Marine Transport Lines, Inc.*, should have been decided by the district court as the determinative issue in this case. See *Czaplicki v. The Hoegh Silvercloud*, 1956, 351 U.S. 525, 533-534, 76 S.Ct. 946, 100 L.Ed. 1387."

Since the errors in this case require a reversal it should be remanded for a trial on all issues, whether grounded on

unseaworthiness or negligence. It would be unfair to try this case piece-meal. As stated by Judge Burke in *LeGate v. The Panamolga*, 211 F. (2d) 689:

“Since we must reverse for dismissing the claim based on unseaworthiness, we think it would be a harsh result to permit the suit to continue and at the same time limit the scope.”

See also *Troupe v. Chicago D & G Bay Transit Co.*, 234 F. (2d) 253.

PROPOSITION NUMBER THREE

The District Court by its practice and procedure has altered and denied the rights of this litigant as those rights are established in federal law: the trial court's submission of issues Nos. 3 and 14 and definitions of “unseaworthy” effectively denied petitioner's right to recovery under the “unseaworthy” doctrine.

Argument and Authorities

The Court's charge denied petitioner his rights as a seaman under the maritime law.

Assuming that the trial court's erroneous, confusing and wholly unrealistic issues Nos. 3 and 14 and the definitions given in connection with them were proper under the Texas law—which, of course, they were not—the submission of issues 3 and 14 and definitions denied Petitioner his rights under the applicable Federal Law which is paramount and should be given uniform application throughout the nation. Obviously erroneous was the submission of issues 3 and 14 and definitions both under Federal and Texas Law.

It is obvious that Petitioner was prejudiced by the Court's submission of Special Issues Numbers 3 and 14 (R. 359-

362) and the definition of "unseaworthiness" as given by the Court, that is, instructing the jury that the term "unseaworthy" applies to the vessel *as a whole* rather than to the specific appurtenances i.e. windows on the deck above the galley made the basis of this suit. Such submission not only compelled the jury to answer Special Issues 3 and 14 "No," but prevented the jury, under the Court's specific instructions, from answering (proximate cause) issues 4 (R. 359) and 15 (R. 362) respectively. That the jurors were misled and confused by Special Issues Nos. 3 and 14 and definitions following such issues is evidenced by the question they sent out, as well as by the affidavits of the six jurors, one of whom was the foreman and at least one of whom, Mr. Byrd, was a retired Navy Officer of the United States who knew and understood ships.

Petitioner strenuously objected and excepted to Issues Nos. 3 and 14 and the definitions (R. 359 and 362) given because they compelled the jury to answer these two issues "No." Indeed, if the test of liability for unseaworthiness were that the defect of appliance causing injuries must be of such magnitude as to cause the vessel as a whole to be unfit for the purpose for which it is intended, then these issues should not have been submitted at all because no proof was offered to show any such fact. Petitioner's pleading and proof were directed to prove the breach of well established maritime rights and duties, his complaint being limited to the three windows over the stairs and the deck above the galley not being watertight, i.e., unseaworthy. Petitioner never contended that such defects made the crew ship *as a whole* unseaworthy. Thus, Issues 2 and 13 should have been followed by issues inquiring of the jury whether the portholes, or windows, not being watertight (Petitioner's requested Issue No. 3) (R. 371) and the deck above the galley not being watertight (Petitioner's requested

Issue No. 14)“(R. 373) were each a proximate cause of Petitioner's injuries. The Court refused to submit such issues but instead submitted Special Issues Numbers 3 and 14 reading as follows:

“If you have answered the preceding special issue ‘They were not,’ then you will answer the following Special Issue, otherwise you need not answer.”

SPECIAL ISSUE NO. 3

“Do you find from a preponderance of the evidence that the portholes, or windows, in question not being in a watertight condition, if you have so found in answer to Special Issue No. 2, made the *crewship* in question ‘unseaworthy’ as defined herein?”

“You are instructed that the term ‘unseaworthy’ as used herein means that the vessel with its appliances and fittings is not reasonably fit for the purposes for which *it* is being used.”

“Answer ‘Yes,’ or ‘No’.” (R. 359).

The Court in exactly the same language submitted Special Issue 14 (R. 362), dealing with the deck above the galley. These issues, as submitted by the Court, imposed a greater burden upon the Petitioner than required by law in that it required him to prove that by reason of the windows, and the deck above the galley not being watertight rendered the vessel *as a whole* unseaworthy.

The legal test is whether the windows or portholes on the port side and the deck above the galley not being watertight rendered such *particular windows* or *the deck* above the galley unseaworthy. *Campbell v. Tidewater Associated Oil Co.*, 1956 AMC 1377 at p. 1379-80. The duty imposed by the warranty of seaworthiness has been variously stated to be a duty that the *appurtenance in question*

on the ship net be "inadequate for the purpose for which it was ordinarily used" *Mahnich v. Southern Steamship Co.*, *supra*, and that the "Equipment (on the ship) be reasonably fit for the use for which it is intended" *Manhat v. U. S.*, 220 F.(2d) 143 at p. 148 (2. CA) cert. den. 349 U.S. 966. Obviously, the jury could not conclude as a *factual* matter that the defective condition of the portholes or windows made the ship as a whole unseaworthy. A jury composed of laymen, not familiar with nor instructed on the principle of unseaworthiness as applicable to the relationship of shipowner and seaman could easily conclude, as indeed the jury did here, that a ship can sail the Gulf of Mexico with windows and deck above the gallery not watertight, indeed without any windows at all or without any deck over the gallery, a vessel could be considered reasonably fit for the purpose for which it was being used, which in this instance was transporting drilling crew members to and from location in the Gulf of Mexico, just like a vessel with two missing hatch covers, *Pope & Talbot v. Hawn*, 198 F.(2d) 800, 346 U.S. 406, 74 S.Ct. 202; a defective rope, *Mahnich v. Southern S.S. Co.*, 64 S.Ct. 455, 321 U.S. 96; a defective block, *Seas Shipping Co. v. Sieracki*, 149 F.(2d) 98, 328 U.S. 85, 66 S.Ct. 872; a defective door knob, *The H. A. Scandrett*, *Sellon v. Great Lakes Transit Corporation* (C.C.A. 2d Cir.), 87 F.(2d) 708; a defective ladder leading to and from the vessel to the dock, *United States v. Smith*, 220 F.(2d) 548; failure of lighting in a specific hatch, *Crawford v. Pope & Talbot*, 206 F.(2d) 784; the absence of a cover guard over a radiator, *Bentley v. Albatross Steamship Co.*, 203 F.(2d) 270; a defective handle on a hatchcover, *Lauro v. United States*, 162 F.(2d) 32; an unguarded part of a moving pump, *Seeandbee*, 102 F.(2d) 577, p. 581; the presence of grease on a ladder, *Oakes v. Graham Towing Company*, 135 F.Supp. 498, 1955 A.M.C. p. 1824; a seaman of vicious proclivities, *Keen v. Overseas Tankship Corp.*,

194 F.(2d) 515, cert. den., 343 U.S. 966, 72 S.Ct. 1061, 96 L.Ed. 1363; a defective block, *Pettersen v. Alaska Shipping Co.*, 347 U.S. 396, 74 S.Ct. 601, 98 L.Ed. 798; *Grillea v. United States*, 232 F.(2d) 919, C.C.A. 2d. 1956, and a host of others were as a factual matter reasonably fit for navigating. All of these individual defective conditions have been held, under the maritime law, to constitute unseaworthiness as a matter of law. None of the conditions hereinabove set out affected the vessel as a whole. Indeed, a vessel can be reasonably fit for the purpose of transporting cargo and still have a defective rope, a missing hatch cover, a missing guardrail, a missing cover guard over a radiator, a defective handle on a hatch cover, etc., yet, the Courts under the applicable Federal Law have held as a matter of law that such omissions or defects constitute unseaworthiness in law which, if proximately causing injury, entitle such seamen to compensatory damages.

To inquire of a jury whether a defective rope aboard a vessel with other good ropes aboard (*Mahnich* case), a defective handle to a hatch cover, a missing guard over a radiator, windows that are not watertight, or a deck over a galley not being watertight, etc., rendered the vessel as a whole unseaworthy from a factual standpoint, as was done in the case at Bar, would make a mockery of the doctrine of unseaworthiness. Such a contention is wholly unrealistic and not in keeping with the broad protection given American Merchant Seamen under the maritime law.

Even in our Federal Courts where cases such as these are submitted either on a general charge or by a general charge and special interrogatories under Rule 49 of the F.R.C.P., the jury is only asked to pass on disputed fact questions. It is true that under our Federal practice the Court instructs the jury generally on the applicable law and under such circumstances explains to the jury what is

meant by unseaworthiness, saying generally—"That by the term unseaworthiness is meant that the vessel and its equipment are not reasonably suited for the purpose for which they are intended," but then the Court instructs the jury that if they find a specific condition complained of as in this instance that the windows were not watertight, and/or the deck was not watertight, and such condition proximately caused the seaman's injuries, then such condition constitutes unseaworthiness and they must find for the plaintiff.

The latest and clearest principle of law applicable in such cases especially with reference to what constitutes "unseaworthiness" in law and the proper method of submitting such issues to the jury can be found in *Pope & Talbot v. Hawn*, 198 F.(2d) 800, affirmed 346 U.S. 406, 74 S.Ct. 202 and *Alaska Steamship Co. v. Petterson*, 205 F.(2d) 478, affirmed 347 U.S. 396, 74 S.Ct. 601.

In the *Petterson* case, *supra*, the Court of Appeals stated as follows:

"If the block was being put to a proper use in a manner, as found by the district judge, it is a logical inference that it would not have broken unless it was defective—that is, unless it was unseaworthy. * * *

"It is only necessary to show that the condition upon which the absolute liability is determined—unseaworthiness—exists. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561."

We respectfully call the Court's attention to the opinion of the Court of Appeals in the *Hawn* case in which that Court quotes with approval, the charge to the jury as follows:

"Therefore, if you should find that at the time the S. S. 'JOHN DICKINSON' arrived in the port of Phila-

adelphia and before the shore side workers commenced working on the vessel *two hatch covers were missing from the hatch in the 'tween deck of the No. 4 hold and that by reason thereof plaintiff fell to the hold below and was injured, your verdict should be for the plaintiff;* and against Pope & Talbot, Inc., even if you should also find that Pope & Talbot, Inc., was not guilty of negligence for any such case, the liability of Pope & Talbot, Inc., is absolute and does not depend upon its failure to exercise due care. * * *

Had the *Hawn* case been tried under the Texas Rules of Civil Procedure the issue propounded to the jury would have been as follows:

SPECIAL ISSUE NO. 1

"Do you find from a preponderance of the evidence that at the time the SS 'JOHN DICKSON' arrived in the port of Philadelphia and before the shoreside workers commenced working on said vessel, *two hatch covers were missing from the hatch in the 'tween deck of the No. 4 hold?*"

"Answer 'Yes' or 'No.'"

"If you have answered the preceding Special Issue 'Yes' then you will answer the following Special Issue, otherwise, you need not answer."

SPECIAL ISSUE NO. 2

"Do you find from a preponderance of the evidence that the missing two hatch covers in the 'tween deck of the No. 4 Hold, if you have so found, was a proximate cause of plaintiff's injury?"

An affirmative answer to these two issues would impose liability for the existence of the condition (missing hatch

covers) making that portion of the vessel unseaworthy as a matter of law.

The right to compensatory damages if a seaman is injured by reason of unseaworthiness is a federally created right as interpreted by the Federal Courts and must be so interpreted in the State Courts where the case is tried. Procedural matters which deny a seaman such federally created rights cannot be followed. *Garrett v. Moore, McCormack*, 317 U.S. 239, 63 S.Ct. 246, in which the Court stated as follows:

"This Court has specifically held, that the Jones Act is to have a uniform application throughout the country unaffected by 'local views of common law rules.' *Panama R. Co. v. Johnson*, 264 U.S. 375, 392, 44 S.Ct. 391, 396, 68 L.Ed. 748. The Act is based upon and incorporates by reference the Federal Employers' Liability Act, 45 U.S.C.A., Sec. 51, et seq., which also requires uniform interpretation. (*Mondou v. New York, New Haven & Hartford Railroad Co.*), 223 U.S. 1, 55 et seq., 32 S.Ct. 169, 177; 56 L.Ed. 327, 38 L.R.A., N.S., 44. This uniformity requirement extends to the type of proof necessary for judgment. *New Orleans & N. E. R. Co. v. Harris*, 247 U.S. 367, 38 S.Ct. 535, 62 L.Ed. 1167. * * *

"* * * The source of the governing law applied is the national, not the state, governments. If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in Federal Law, the remedy afforded by the state would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less, but more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all

substantive rights intended to be afforded them by the jurisdiction in which the right itself originates."

In *Norfolk Southern Railroad Company v. Walter G. Ferebee*, 35 S.Ct. 781, 238 U.S. 269, this Court considered and held that a substantive right or defense arising under a Federal Statute cannot be destroyed or lessened by a local rule of practice, stating:

"But a substantive right or defense arising under the Federal Law cannot be lessened or destroyed by a rule of practice. Damages and contributory negligence are so blended and interwoven, and the conduct of the plaintiff at the time of the accident is so important a matter in the assessment of damages, that the instances would be rare in which it would be proper to submit to a jury the question of damages without also permitting them to consider the conduct of the plaintiff at the time of the injury."

In *Carlisle Packing Co. v. Sandanger*, 42 S.Ct. 475, 259 U.S. 255, this Court reaffirmed the principle of absolute liability of an unseaworthy appliance causing injury, stating as follows:

"* * * in the present cause, we think the trial court might have told the jury that without regard to negligence the vessel was unseaworthy when she left the dock if the can marked 'coal oil' contained gasoline; also that she was unseaworthy if no life preservers were then on board; and that if thus unseaworthy and one of the crew received damage as the direct result thereof, he was entitled to recover compensatory damages."

This unquestionably has been and is the law. Later decisions have liberalized and extended the doctrine—Seas

Shipping Company v. Sieracki, supra; Maklich v. Southern Steamship Co., supra; Alaska Steamship Co. v. Petterson, 205 F.(2d) 478, 347 U.S. 396, 74 S.Ct. 601. Poignant v. U. S., 225 F.(2d) 595. The trial court here, however, reversed the process and, instead of instructing the jury that a window that is not watertight causing water to spill on stairs upon which members of the crew must walk in the discharge of their duties makes the vessel—in legal contemplation—unseaworthy, asked the jury whether such condition made the vessel *as a whole* (the ship, crew) Issues Nos. 4 and 15 unseaworthy. Thus the jury was asked to pass upon a question of law, which in view of the Court's definition is so confusing that the jury sent out a question in writing for clarification, which the Court refused to answer. Many more cases can be cited that a right based upon the Federal Law cannot be altered or denied by state procedure, *a fortiori*, exists when the procedure brings on an erroneous application of the law and is confusing to the jury. *Balado v. Lykes Bros. Steamship Co., Inc.*, 179 F.(2d) 943 (Second Circuit), in which the Court stated as follows:

"[The owner owes each member of the crew, this plaintiff in particular, a seaworthy vessel, that is a vessel that is calculated to meet all the risks of its trip or voyage on which it sets out]. But he added: [you will have to determine whether she sailed with a sprung door and whether the defendant should have known the door was sprung. ***]

[If the vessel started out *with a door that was sprung or was otherwise inadequate to keep sea water from entering the crew's messroom*, and there was evidence from which a jury might find that the ship sailed in such a condition *and that the plaintiff's injuries were caused by it*, the owner was liable for sailing with an unseaworthy vessel irrespective of negligence or knowl-

edge of the condition of the vessel prior to her sailing. The H. A. Scandrett, 2 Cir., 87 F.(2d) 708. In the circumstances, *there is confusion as to the meaning of the charge and doubt whether the judge did not intend to require the jury to find not only that the door was sprung before the ship sailed but also to find defendant ought to have known that the door was sprung before liability for unseaworthiness could be imposed.]*

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that judgment of the District Court and the Court of Civil Appeals for the Fifth Supreme Judicial District be reversed and the case remanded to the trial court for trial on the issues of unseaworthiness and negligence.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1957

No. 83

RICHARD McALLISTER,

Petitioner,

v.s.

MAGNOLIA PETROLEUM COMPANY,

Respondent,

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE
FIFTH SUPREME JUDICIAL DISTRICT

REPLY BRIEF FOR PETITIONER

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INDEX

SUBJECT INDEX

	Page
Additional Statement	1-3
Argument	4-7
Conclusion	8
Appendices:	
A—Texas Rules of Civil Procedure, Rule 277	9
B—Texas Rules of Civil Procedure, Rule 272	10

INDEX OF AUTHORITIES

<i>Arnold v. Panhandle and Santa Fe Railway Co.</i> ; 353 U.S. 360, 77 S.Ct. 840	4
<i>Cookingham v. United States</i> , 184 F.2d 213, cert. den. 340 U.S. 935	7
<i>Gray County Gas Co. v. Oldham</i> , 238 S.W.2d 596	4
<i>Grillea v. United States</i> , 232 F.2d 919	7
<i>Holliday v. Pacific Atlantic S.S. Co.</i> ; 99 F.Supp. 173	7
<i>Poignant v. Hawn</i> , 346 U.S. 406, 74 S.Ct. 202	7
<i>Pope & Talbot v. Hawn</i> , 346 U.S. 406, 74 S.Ct. 202	7
<i>Seas Shipping Co. v. Sieracki</i> , 149 F.2d 28, 328 U.S. 185, 66 S.Ct. 872	7
<i>Shannon v. Union Barge Line Corp.</i> ; 194 F.2d 584, cert. den. 344 U.S. 846	7

TEXAS STATUTES

Texas Rules of Civil Procedure,	
Rule 272	10
Rule 277	9

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 83

RICHARD McALLISTER,

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MAGNOLIA PETROLEUM COMPANY,

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ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE
FIFTH SUPREME JUDICIAL DISTRICT

REPLY BRIEF FOR PETITIONER

Additional Statement

In view of the position taken by Respondent in its Counter Proposition Number Two, we believe a reply will be of aid to the Court. Respondent's argument may be divided as follows:

- (1) Petitioner did not submit properly drawn issue or definition to the trial court (Respondent's brief, page 11).
- (2) A court cannot consider ex parte affidavits of the jurors (Respondent's brief, page 13).
- (3) There was no finding by either the jury or the Court of water upon the steps from which Petitioner fell (Respondent's brief, pages 13, 15).

- 2
- (4) The condition of water upon the steps was a transitory one; hence Respondent is not liable (Respondent's brief; page 15).

Argument

Respondent's argument on Counter Proposition Number One has been anticipated. Petitioner's contention is fully set out in his original brief. We shall, therefore, limit this reply to Respondent's Counter Proposition Number Two.

- (1) Petitioner did not submit properly drawn issue or definition to the trial court (Respondent's brief, page 11).

Rule 279 of Texas Rules of Civil Procedure (Appendix A), among other things, provides as follows:

"Failure to submit a definition of explanatory instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or explanatory instruction has been requested in writing and tendered by the party complaining of the judgment."

(See Commentaries, Vol. 1, R.C. p. 221—"Tender of substantially correct issue and instruction".)

Respondent's argument either overlooks or fails to understand Petitioner's complaint. The complaint was not levelled to Issues Numbers 3 and 14. Indeed, the Court submitted these issues in a form substantially as requested by Petitioner. The complaint is levelled at the *definition* and/or *instruction* given the jury in connection with these issues, requiring the jury to apply the standard of unseaworthiness to the vessel as a whole (R. 359, 362). Petitioner's requested definition limited the application of the

standard of unseaworthiness to the portholes, or windows, above the stairs leading from the lounge to the galley (Issue No. 3) and to the deck above the galley (Issue No. 14), as pleaded and proven. The Court's submitted definition and instruction is in exactly the same general language as the one requested by Petitioner; the only difference being that the Court's definition required the defect to render the vessel as a whole unseaworthy. Petitioner's definition required only that the condition complained about, i.e., the portholes, or windows, and the deck to be unseaworthy. The definition as submitted by the Court read as follows:

"You are instructed that by the term 'unseaworthy', as used herein, means that a vessel with its appliances and fittings is not reasonably fit for the purpose for which it is being used. Answer 'Yes', or 'No'" (R. pp. 359, 362).

The definition as requested by Petitioner reads as follows:

"You are instructed that by the term 'unseaworthy', as used herein, is meant that the portholes over and near the galley stairs leading to and from the lounge of the crewship in question were not reasonably fit for the purpose for which said portholes, or windows, were used."

It is obvious that this difference is one of substance, and such difference is reflected by the inquiry made by the jury to the Court, which inquiry the Court refused to answer (R. p. 419). The jury's question read as follows:

"Judge Long: In special issue 3 is the term 'unseaworthy' referring to the vessel as a whole or the three windows on the portside? /s/ James H. Brown, Foreman."

The trial court overruled Petitioner's timely exception to the Court's definition, clearly pointing out the reasons for such exception, in accordance with Rule 279, T.R.C.P. (R. 371-373). The requested definition and instruction and the requested issues were in conformity with the evidence and Petitioner's pleadings (R. 7), which described with particularity the unseaworthy condition of the portholes and the deck above the galley:

But Respondent's contention is without merit on still another ground, for even if it be conceded that there might be some technical merit to Respondent's contention that the local rules of practice have not been followed, this Court in *Arnold v. Panhandle and Santa Fe Railway Co.*, 353 U.S. 360, 77 S.Ct. 840, has determined that a federally created right cannot be nullified under the name of a local practice. This Court will not accept interpretations that nullify the effect of federal rights.

The case of *Gray County Gas Co. v. Oldham*, 238 S.W. 2d 596, relied on by Respondent is no authority for the proposition urged both on the facts as well as the pleading.

(2) A court cannot consider ex parte affidavits of the jurors (Respondent's brief, page 13).

Respondent argues that Special Issues 3 and 14, and their definitions, are so clear and unambiguous that no jury could fail to know that they were limited to the conditions referred to; Issue 2 (portholes) and Issue 13 (deck above the galley); and hence this Court cannot take into consideration the ex parte affidavits of the jury members attached to Petitioner's motion for a new trial. Respondent's statement that no juror could fail to know what these issues 3 and 14 referred to and were limited to—the conditions inquired about in Issues 2 and 13—is completely contradicted by the question the jury set out regarding

these very issues. The Court, therefore, need not look to the affidavits to discover that the jurors were misled by the Court's definitions and instructions. The jury's inquiry establishes it without question; and it applies equally to Issue No. 14. (Stipulations, R. 419). The Court's refusal to answer this inquiry left the jury in the same state of confusion which the improper and misleading definition and instruction led them into.

- (3) There was no finding by either the jury or the court of water upon the steps from which Petitioner fell (Respondent's brief, pages 13, 15).

The evidence was undisputed that there was sea water on the steps and that it came from the portholes and the deck. Captain Dressel (R. 14) admitted it, stating that the reason precautions were taken to prevent the portholes from leaking was because it was dangerous to those using those steps (R. 18).

"Q. And the reason you did that, you knew it was dangerous for that water to splash on the stairs because somebody might fall and get hurt?

A. Yes, sir."

R. 27:

"Q. When that happened, what, if anything, happened to the area immediately below the portholes or windows, or whatever you may call them?

A. It would get wet.

Q. What would get wet?

A. Well, the deck, the bulkheads, the ladders, anything that might be below those portholes would get wet."

(See also Record pages 31, 37, 38.)

The condition was duly recorded in the vessel's log book (R. p. 17), and it is supported by the testimony of Respondent's witness (R. pp. 262, 264, 265, 268, 271, 278 and 305).

The fact that Respondent's expert witnesses testified that it is more difficult to slip when there is sea water on the steps, or oil, or film on the steps, than when the steps are dry does not establish as a matter of law that Petitioner did not slip and fall by reason of water on the steps. At best the testimony of such experts simply constitutes evidence which the jury could either accept or reject. Such testimony would not establish a fact upon which reasonable minds could not differ. The testimony of the Master, owner *pro hac vice* of the vessel (*The Abangarez*, 60 F.2d 543), testified that sea water on the steps was dangerous because it may cause someone to fall and get hurt. There being no dispute but that water was on the steps, the Court properly did not submit such an issue to the jury (Rule 272, T.R.C.P., Appendix B). The sole and only reason the trial court entered judgment for Respondent was that the jury, having answered Issues 3 and 14 in the negative, were instructed not to answer Issues 4 and 15 (proximate cause). It is Petitioner's position that the jury's inquiry (R. 419) demonstrates, without regard to the affidavits of the jurors, that with a proper definition and instruction the answers to Issues 3 and 14 would likely, or at least might have been, answered affirmatively, in which event the jury would have had to answer Issues 4 and 15 (proximate cause).

- (4) The condition of water upon the steps was a transitory one, hence Respondent is not liable.

Respondent contends before this Court that even if there was water on the steps proximately causing Petitioner's injury, it was a transitory condition and hence no liability

is imposed on it. Respondent would have this Court adhere to the now discredited doctrine of "transitory unseaworthiness" enunciated in *Cookingham v. United States*, 184 F.2d 213, cert. den. 340 U.S. 935, now referred to as the "Cookingham doctrine". This is to misunderstand Petitioner's theory of the case which is not that for some unknown reason, or by some unknown person, water was spilled on the steps thereby rendering the *steps unseaworthy*. Petitioner never made any such contention. On the contrary, the contention is that the *unseaworthy condition of the port-holes over the steps and the deck above the galley caused the steps to be wet.* Even if the *Cookingham* doctrine would still be the law, it does not apply here since the condition of the portholes and the deck on the J. C. STEPHENS was a long continuing one, of which the Master and other representatives in a supervisory capacity of the employer had knowledge. The correct understanding of "unseaworthiness" is that it applies upon the instant the condition arises. *Poignant v. United States*, 225 F.2d 594 (2nd Cir.); *Pope, & Talbot v. Hawn*, 346 U.S. 406, 74 S.Ct. 202; *Seas Shipping Co. v. Sieracki*, 149 F.2d 28, 328 U.S. 85, 66 S.Ct. 872 and *Grillet v. United States*, 232 F.2d 919. In any event the *Cookingham* case, *supra*, *Shannon v. Union Barge Line Corp.*, 194 F.2d 584, cert. den. 344 U.S. 846, and *Holliday v. Pacific Atlantic S.S. Co.*, 99 F.Supp. 173, relied upon by Respondent have been repudiated by the later decisions of the circuits that have reviewed them, and particularly the Second and Ninth Circuits.

CONCLUSION

It is, therefore, respectfully prayed that this Honorable Court reverse the judgment of the Court of Civil Appeals of Texas, and remand the case to the District Court of Dallas County, Texas, for a trial on the issues of unseaworthiness and negligence.

Respectfully submitted,

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APPENDIX A

Texas Rules of Civil Procedure

Rule 277. Special Issues.

In all jury cases the court may submit said cause upon special issues without request of either party, and, upon request of either party, shall submit the cause upon special issues raised by the written pleadings and the evidence in the case, except that, for good cause subject to review or on agreement of the parties, the court may submit the same on a general charge. Such special issues shall be submitted distinctly and separately and each issue shall be answered by the jury separately, provided, that if it be deemed advisable, the court may submit disjunctively in the same question two inconsistent issues where it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists. For example, the court may, in a workmen's compensation case, submit in one question whether the injured employee was permanently or only temporarily disabled. Where practicable, all issues should be submitted in the affirmative and in plain and simple language. It is proper to so frame the issue as to place the burden of proof thereon, but where, in the opinion of the court, this cannot be done without complicating the form of the issue, the burden of proof on such issue may be placed by a separate instruction thereon. In submitting special issues the court shall submit such explanatory instructions and such definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict on such issues, and in such instances the charge shall not be subject to the objection that it is a general charge. If the nature of the suit is such that it cannot be determined on the submission of special issues, the court may refuse the request to do so, but the action of the court in refusing may be reviewed on proper exception in the appellate court, and this rule shall be construed in connection with the succeeding rule. Amended by order of March 31, 1941.

APPENDIX B**Texas Rules of Civil Procedure****Rule 272. Requisites.**

The charge shall be in writing, signed by the judge, and filed with the clerk, and shall be a part of the record of the cause. It shall be prepared after the evidence has been concluded and shall be submitted to the respective parties or their attorneys for inspection, and a reasonable time given them in which to examine and present objections thereto, which objections shall in every instance be presented to the court in writing before the charge is read to the jury, and all objections not so made and presented shall be considered as waived. When written objections have been so made and presented, if the court overrules same, he shall endorse his ruling thereon and sign the same officially, and when the same is so endorsed, it shall constitute a sufficient bill of exception to the ruling of the court thereon, and when so endorsed by the judge it shall be presumed, unless otherwise noted thereon, that the party making such objections presented the same at the proper time and excepted to the ruling thereon. The requirement that the objections to the court's charge shall be in writing will be sufficiently complied with if such objections are dictated to the court reporter in the presence of and with the consent of the court and opposing counsel, before the reading of the court's charge to the jury; and are subsequently transcribed and the court's ruling and official signature endorsed thereon and filed with the clerk in time to be included in the transcript. Failure of the court to give reasonable time to the parties or their attorneys for examination of the charge shall be reviewable upon appeal upon proper exception. The judge shall so frame his charge as to distinctly separate questions of law from questions of fact, and not therein comment on the weight of the evidence, and so as to instruct the jury as to the law arising on the facts, and shall only submit controverted questions of fact.

Amended by order of September 20, 1941, effective December 31, 1941.

FILED

JAN 21 1958

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In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. 83

RICHARD McALLISTER,

Petitioner

v.

MAGNOLIA PETROLEUM COMPANY,

Respondent.

On Writ of Certiorari to the Court of Civil Appeals for the
Fifth Supreme Judicial District

**BRIEF ON THE MERITS FOR RESPONDENT,
MAGNOLIA PETROLEUM COMPANY**

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INDEX

	Page
Subject Index	
BRIEF OF RESPONDENT:	
Statement of the Case	1-3
Questions Presented for Review	3
Counter Proposition Number One	4
Argument and Authorities under Proposition Number One	4-10
Counter Proposition Number Two	10
Argument and Authorities under Proposition Number Two	10-16
Conclusion	16-17
Appendices:	
A—Art. 5526, Sec. 6, Vernon's Annotated Civil Statutes of Texas (1925)	19
B—Federal Employers' Liability Act, 45 U. S. C. A., Sec. 52	21
45 U. S. C. A., Sec. 56	21
C—Jones Act, 46 U. S. C. A., Sec. 688	23
D—Texas Rules of Civil Procedure, Rule 277	25
Rule 279	26-27
Rule 434	27-28

CASES

	Page
Alaska Steamship Co. v. Petterson, 347 U. S. 396	9
Arizona, The v. Anelich, 298 U. S. 110	8
Baltimore Steamship Co. v. Phillips, 274 U. S. 316	9
Beadle v. Spencer, 298 U. S. 124	8
Borgman v. Sword Line, Inc., 81 N. Y. S. 2d 445	8
Boudoin v. Lykes Brothers Steamship Co., Inc., 348 U. S. 336	12
Campbell v. Haverhill, 155 U. S. 610	5
Cookingham v. United States, 184 F. 2d 213, cert. den. 340 U. S. 935	14-15
Cortes v. Baltimore Insular Line, 287 U. S. 367	6
Cox v. Roth, 348 U. S. 207	9, 10
DeZon v. American President Lines, 318 U. S. 660	6
Engel v. Davenport, 271 U. S. 33	6, 7, 8
Gautier v. Franklin, 1 Tex. 732	5
Gray County Gas Co. v. Oldham, 238 S. W. 2d 596	12
Holliday v. Pacific Atlantic S.S. Co., 99 F. Supp. 173	15
John v. Paullin, 231 U. S. 583	5
LeGate v. Panamolga, 221 F. 2d 689	9
McGhee v. United States, 165 F. 2d 287	8
McKenney, The Wm. A., 41 F. 2d 754	10
Mahnich v. Southern Steamship Co., 321 U. S. 96, 135 F. 2d 602	9
Oroz v. American President Lines, 154 F. Supp. 241	9

Citations—(Continued)

iii

Page

Osceola, The, 189 U. S. 158	6
Panama Railway v. Johnson, 264 U. S. 375	9
Seas Shipping Co. v. Sieracki, 328 U. S. 85	9
Shannon v. Union Barge Line Corp., 194 F. 2d 584, cert. den. 344 U. S. 846	15
Tilliard v. Hall, 32 S. W. 863	35

UNITED STATES CONSTITUTION:

Amendment VII	4
---------------	---

UNITED STATES STATUTES:

Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51, et seq.	6
---	---

Jones Act, 46 U. S. C. A. 688, et seq.	6, 7, 8, 9, 10
--	----------------

TEXAS RULES AND STATUTES:

Texas Rules of Civil Procedure, Rule 277	3, 11
---	-------

Rule 279	15-16
----------	-------

Rule 434	16
----------	----

Vernon's Annotated Civil Statutes of Texas (1925), Art. 5526	3, 5
---	------

TEXT:

41B Texas Jurisprudence 614	12
-----------------------------	----



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MAGNOLIA PETROLEUM COMPANY,

Respondent.

*On Writ of Certiorari to the Court of Civil Appeals for the
Fifth Supreme Judicial District*

BRIEF ON THE MERITS FOR RESPONDENT, MAGNOLIA PETROLEUM COMPANY

STATEMENT OF THE CASE

Petitioner, a seaman, filed suit on August 27, 1953 (R. 1), for damages allegedly sustained as a result of a fall on October 19, 1950. (R. 17). Petitioner alleged ten specific acts of negligence (R. 6) and also unseaworthiness in two particulars (R. 7). Trial was to a jury, which in response

to special interrogatories found: Plaintiff fell and sustained a bodily injury (R. 358); certain portholes (R. 358) and a specified deck (R. 362) were not "watertight," but that such conditions did not make the crewship unseaworthy (R. 359 and 362); that the deck and ports not being watertight was not due to negligence (R. 360 and 363); that the ports in question were maintained in proper repair (R. 360); that plaintiff's shoes were wet before he attempted to descend the ladder (R. 365), but that it was not negligence for him to use the ladder with his shoes being wet (R. 365); that the injuries were the result of an "unavoidable accident" (R. 366); that there was no oil on the step (R. 361); that plaintiff would reach maximum recovery on September 11, 1956 (R. 367); and that the amount of his damages was \$32,500.

Based on these findings, the trial court entered judgment for petitioner for \$6,258 for maintenance. The trial court did not hold that plaintiff's action for indemnity was barred. The Court of Civil Appeals of the Fifth Judicial District affirmed the judgment and respondent has paid petitioner the amount decreed.

Either here or below, petitioner has not complained of error relating to his claim for indemnity due to negligence. Petitioner does complain of the trial court's form of submission for the interrogatories relating to unseaworthiness simpliciter. Respondent in the court below urged affirm-

ance because of the Texas statute of limitation; because the transient nature of the substance alleged to be on the tread did not render the vessel unseaworthy; because the jury found no water on the steps; because jury found no oil on ladder; because plaintiff had not preserved his points on appeal by properly requesting interrogatories essential to his recovery. The Court of Civil Appeals decided the case on the sole point of law that the action was barred, and did not pass on petitioner's points of error or on respondent's counterpoints.

Petitioner plead and tried his case on the theory of a foreign substance on the ladder causing the fall. The jury exonerated the defendant in all particulars, the trial court entered judgment on the findings (R. 381-395), and the Court of Civil Appeals affirmed, but on the sole point that the action reserved for appeal was barred by Article 5526, *Vernon's Annotated Civil Statutes of Texas*.

QUESTIONS PRESENTED FOR REVIEW

Respondent asserts that the fourth of petitioner's listed questions presented for review (Respondent's Brief, p. 5) is not properly before this Court because petitioner at the trial failed to tender a properly phrased issue, a necessary predicate under Rule 277, *Texas Rules of Civil Procedure*, and because it was not passed upon by the Court to which certiorari issued.

COUNTER PROPOSITION NUMBER ONE

A seaman asserting a cause of action based on non-negligent unseaworthiness in a state court must bring his claim within the applicable period of limitation prescribed by the law of the forum.

ARGUMENT AND AUTHORITIES

In this case the facts are determined. The jury binds the litigants to its version of the event upon which petitioner's claim is founded. The Seventh Amendment to the Constitution limits review by Federal Courts. The jury-found facts are: Plaintiff fell and sustained injuries. Special Issue No. 31 (R. 366 and R. 392), together with its accompanying instructions:

"Do you find from a preponderance of the evidence that the injuries, if any, sustained by plaintiff McAllister, at the time and on the occasion in question, were not the result of an unavoidable accident?"

"Let the form of your answer be 'They were not the result of an unavoidable accident' or 'They were the result of an unavoidable accident.'

"In connection with the foregoing special issue you are instructed that the term 'unavoidable accident' means an event occurring without the negligence of plaintiff McAllister or the defendant Magnolia Petroleum Company, its officers, agents or employes."

"ANSWER: They were the result of an unavoidable accident."

is a complete exoneration of any negligence by defendant. Special Issue No. 6 (R. 360) found no negligence in failing

to keep the ports and windows "watertight." Special Issue No. 7 (R. 360) found defendant kept such windows in proper repair. Special Issue No. 16 (R. 363) found there was no negligence in failing to keep the deck "watertight." There were no other negligence submissions. Thus defendant was exonerated from specially pleaded acts of negligence, and generally exonerated from all acts of negligence by the finding of unavoidable accident. Plaintiff did not make any complaint below as to any error at trial relating to negligence, and the opinion of the Court of Civil Appeals so holds (R. 422).

No appeal having been taken from the portion of the judgment denying recovery for negligence, the court below had only to consider points of appeal relating to the method of submission of the issues relating unseaworthiness simpliciter. The court did not reach those points, for it held the cause of action was barred by Art. 5526, Sec. 6, Vernon's *Annotated Civil Statutes of Texas*.

The general statute of limitation provided in Sec. 6, Art. 5526, *Vernon's Annotated Civil Statutes of Texas* (Appendix A), is procedural. *Gautier v. Franklin*, 1 Tex. 732 (1846); *Tilliard v. Hall*, 32 S.W. 863 (1895). Such a statute affects the remedy and not the right. *Campbell v. Haverhill*, 155 U.S. 610 (1895). A state may freely prescribe procedural rules for its courts to apply even in cases involving the enforcement of Federal rights. *John v. Paullin*, 231 U.S. 583 (1913).

Petitioner argues that the *Jones Act*, 46 U. S. C. A. 688, (Appendix C), provides a uniform period of limitation for any action by a seaman for personal injuries in course of employment.

Respondent agrees that for any recovery under the *Jones Act* the period there prescribed will control, but urges that petitioner's cause of action here is not a *Jones Act* cause of action.

The scope of the *Jones Act* is no greater than the *Federal Employers' Liability Act* (Appendix B). Liability under the *Jones Act* exists only for negligence. This Court has so held in *Cortes v. Baltimore Insular Line*, 287 U. S. 367; *DeZon v. American President Lines*, 318 U. S. 660; *Engel v. Davenport*, 271 U. S. 33.

The *Federal Employers' Liability Act* contains a substantive period of limitation. 45 U. S. C. A., Sec. 56.

"No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." (Emphasis added.)

The provision is expressly confined to actions maintained under "this chapter." The only actions provided in the chapter are those based upon negligence.

The jury findings in the trial preclude petitioner's cause of action being based on negligence.

At least as early as *The Osceola*, 189 U. S. 158, an owner is liable to indemnify a seaman for an injury resulting

from the unseaworthiness of the vessel or its appliances. Unseaworthiness is a condition. Unseaworthiness may result from a preventable act or omission (negligence) or from any other cause.

In *Engel v. Davenport*, 271 U. S. 33, this Court recognized that the passage of the *Jones Act* made it important to determine whether unseaworthiness resulted from negligence.

"The present suit is not brought merely to enforce the liability of the owner of the vessel to indemnity for injuries caused by a defective appliance, without regard to negligence, for which an action at law could have been maintained prior to the Merchant Marine Act, *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255; and we need not determine whether if it had been thus brought under the old rules, the state statute of limitations would have been applicable. See *Western Fuel Co. v. Garcia*, 257 U. S. 233. Here the complaint contains an affirmative averment of negligence in respect to the appliance. And, having been brought after the passage of the Merchant Marine Act, we think the suit is to be regarded as one founded on that Act, in which the petitioner, instead of invoking, as he might, the relief accorded him by the old maritime rules, has elected to seek that provided by the new rules in an action at law based upon negligence—in which he not only assumes the burden of proving negligence, but also, under sec. 3 of the Employers Liability Act, subjects himself to a reduction of the damages in proportion to any contributory negligence on his part. * * * *

The holding extended the permissible period of filing in cases founded on unseaworthiness due to negligence.

The Second Circuit, in *McGhee v. United States*, 165 F. 2d 287, interpreted *Engel v. Davenport*, *supra*:

"* * * In *Engel v. Davenport*, the question was whether the statute of limitations applicable to railway employees governed an action brought by a seaman under the Jones Act in a state court. The plaintiff had declared for injuries suffered from a defective appliance and had charged that the defect was negligent. The court held that he was privileged to base his recovery upon the Jones Act; and that, if he did, he was free to take advantage of the longer limitation applicable to that cause of action than the state statute would have allowed, had he sued under the maritime law. That did indeed recognize a cause of action under the Jones Act for negligent unseaworthiness, additional to that under the maritime law; and obviously the plaintiff was bound to prove negligence, if he wished to invoke the longer period. * * *

"* * * Had this added allegation—negligence—been necessary to his recovery for unseaworthiness as it was in *Engel v. Davenport*, *supra*, and in *Kunschman v. United States*, *supra*, he would of course have had to prove it. * * *

Borgman v. Sword Line, Inc., 81 N.Y.S. 2d 445 (New York Supreme Court), supports respondent's position.

Petitioner's argument that all actions by seamen are controlled by the Jones Act is specious. This Court, in *The Arizona v. Anetich*, 298 U.S. 110, and in *Beadle v. Spencer*, 298 U.S. 124, refused to apply the defense of assumption of risk which then existed in railroad cases to seamen, thus recognizing that only a part of maritime law was changed by the Act.

APPENDIX D**Texas Rules of Civil Procedure****Rule 277. Special Issues**

In all jury cases the court may submit said cause upon special issues without request of either party, and, upon request of either party, shall submit the cause upon special issues raised by the written pleadings and the evidence in the case, except that, for good cause subject to review or on agreement of the parties, the court may submit the same on a general charge. Such special issues shall be submitted distinctly and separately and each issue shall be answered by the jury separately, provided, that, if it be deemed advisable, the court may submit disjunctively in the same question two inconsistent issues where it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists. For example, the court may, in a workmen's compensation case, submit in one question whether the injured employee was permanently or only temporarily disabled. Where practicable, all issues should be submitted in the affirmative and in plain and simple language. It is proper to so frame the issue as to place the burden of proof thereon, but where, in the opinion of the court, this cannot be done without complicating the form of the issue, the burden of proof on such issue may be placed by a separate instruction thereon. In submitting special issues the court shall submit such explanatory instructions and such definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict on such issues, and in such instances the charge shall not be subject to the objection that it is a general charge. If the nature of the suit is such that it cannot be determined on the submission of special issues, the court may refuse the request to do so, but the action of the court in refusing may be reviewed on proper exception in the appellate court; and this rule shall be construed in connection with the succeeding rule.

Amended by order of March 31, 1941.

Petitioner states the holding below is in conflict with previous decisions of this Court. An analysis of those cases disproves the statement. *Cox v. Roth*, 348 U. S. 207, was a *Jones Act* case, and recovery was sought for negligence. *Baltimore Steamship Co. v. Phillips*, 274 U. S. 316, holds that under his election the seaman must seek recourse for all grounds of recovery in a single lawsuit. *Panama Railway v. Johnson*, 264 U. S. 375, does not bear on the issue here, but does recognize that the *Jones Act* did not effect a merger of a seaman's rights into only that provided by the Act. *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, and *Alaska Steamship Co. v. Petterson*, 347 U. S. 396, also cited by petitioner, are not *Jones Act* cases, but were applications of the general maritime law doctrine of unseaworthiness to seamen who were not employees.

If petitioner's premise regarding the effect of the *Jones Act*, *supra*, on state-prescribed limitations be correct, this Court would never have had an opportunity to consider its famous case of *Mahyich v. Southern Steamship Co.*, 321 U. S. 96, 135 F. 2d 602 (3d Cir.). That case was filed in admiralty long after the *Jones Act* cause had become barred. This Court remanded the case for trial, thus holding the cause of action was not barred.

Many states permit actions for unseaworthiness to be brought after three years. In New York the permissible period is six years. *Le Gate v. The Panamolga*, 221 F. 2d 689 (2d Cir.), and *Oroz v. American President Lines*, 154 F. Supp. 241 (S. D. N. Y.).

Petitioner's argument would radically shorten the period in such states as New York and would in reason extend to admiralty cases.

Applied to its logical conclusion, petitioner's "rule" would require a holding that the *Jones Act* created a right of action for wrongful death not resulting from negligence, a contrary holding to that of *Cox v. Roth, supra*, and of *The Wm. A. McKenney*, 41 F.2d 754, and similar cases.

In summary, when the seaman asserts an action for unseaworthiness in a state court, he must bring this action within the state-prescribed period if it is based upon unseaworthiness occurring without negligence; but may bring it within the period prescribed by the *Jones Act* if based on negligence. Stated conversely, the *Jones Act* period, when applicable because of negligent unseaworthiness, will be applied to extend but not to shorten the period provided by the local law.

In the case at bar, the court below properly announced and applied the rule.

COUNTER PROPOSITION NUMBER TWO,

Petitioner's points of error do not constitute reversible error and were not passed upon by the court below.

ARGUMENT AND AUTHORITIES

The sole point of error relied upon by petitioner below relates to that portion of the charge relating to unseaworthiness.

The court below did not reach a consideration of the point and consequently no holding or ruling by such court is before this Court.

The complaint of error made by petitioner to the court below is not sufficient because not based on a properly phrased issue tendered to the trial judge before the charge was given to the jury. *Rule 277, Texas Rules of Civil Procedure* (Appendix D).

Petitioner's requested instructions in connection with Special Issues Nos. 3 (R. 372) and 13 (R. 374) are substantially alike and each contains the fatal defect of being an incorrect instruction because each assumes the very fact sought to be determined, namely, that the appurtenance "was not reasonably fit for the purposes for which said *** was used." Under Texas law, the petitioner was required to submit a correct instruction and hence he did not preserve his objection to the court's charge.

The court's charge on unseaworthiness was correct, but even if incorrect was taken from petitioner's pleading and thus cannot be complained of by petitioner.

Petitioner alleged:

"*** That said fall *** was caused *** by the unseaworthiness of the vessel J. C. STEPHENS as hereinafter shown." (R. 5.)

and

"*** that as a concurrent cause of the injuries sustained by him was the unseaworthiness of the said J. C. STEPHENS. ***" (R. 7.)

then the judgment shall not be reversed for such error, but the appellate court shall direct the said judge to correct the error, and thereafter the Court of Civil Appeals shall proceed as if such erroneous action or failure to act had not occurred. Amended by Order of March 31, 1941.

These allegations evidence that petitioner understood that a defective appliance renders the vessel unseaworthy. The court took its charge in this respect from petitioner's own pleading, a practice which has never been held to be reversible error at the instance of the pleader. *Gray County Gas Co. v. Oldham*, 238 S. W. 2d. 596 (Tex. Civ. App.); 41B Tex. Jur. 614.

In *Boudoin v. Lykes Brothers Steamship Co., Inc.*, 348 U. S. 336, this court quoted with approval the following language:

"The warranty of seaworthiness as to hull and gear has never meant that the ship shall withstand every violence of wind and weather; all it means is that she shall be reasonably fit for the voyage in question."

The vessel must be seaworthy and the court's charge so stated.

The court did not give the instruction quoted at page 35 of Petitioner's Brief. Petitioner has altered or misquoted the instruction accompanying Special Issue No. 3, by substituting the definite article "the" for the indefinite article "a." (R. 359.)

Perhaps the instruction could have been correctly given using other words, but those used were themselves correct. The Issues 3 and 14 each followed an inquiry about the watertight condition of a specific portion of the vessel. Issue 3 and Issue 14 were conditionally submitted, that is, the jury was informed that it need not answer the issue if it had found the condition inquired about in the preceding

issues did not exist. No jury could fail to know that Issues 3 and 14 inquired of the condition found to exist in the previous interrogatory.

The *ex parte* affidavits of jury members, to which counsel refers, are not properly a part of the record. It would, indeed, be strange law if losing counsel in a lawsuit could convince individual jurors of their mistaken interpretation of the court's charge, and thus be entitled to a new trial.

The jury's other findings affirmatively show that it found the vessel to be seaworthy. The jury expressly found that the respondent did not fail to keep the ports and windows in proper repair. (R. 386.)

The findings that certain windows and ports (Special Issue 2, R. 384) and a certain deck (Special Issue 13, R. 387) were not "watertight" mean only that some indeterminate quantity of water could, under some conditions, pass into the spaces within the crewship. The essential elements of petitioner's action for unseaworthiness were: (1) petitioner sustained an injury; (2) the injury resulted from a fall caused by sea water on the step; (3) the sea water was there because of a defective condition of the vessel. Petitioner wholly failed to prove either that sea water was on the step or that sea water, if on the step, got there due to a defective condition of the vessel. The finding of non-watertightness of specific portions of the vessel does not include a finding that water passing into the vessel at one place found its way to another, or that water passed into the vessel on the occasion of plaintiff's fall.

The jury fact that petitioner's shoes were wet before he attempted to descend the galley steps (R. 391) as a matter of law precludes the alleged, but unproved, wet step from being a cause of the fall, unless plaintiff could show that more water than was on his shoes made the steps more slick. Quite the contrary is shown by the record. The witnesses Vandever (R. 312) and Barkley (R. 327) throughout their entire testimony proved as a scientific and unrefuted fact that on the particular step from which plaintiff fell, the presence of water, either fresh or salt, increased the coefficient of friction in contact with a leather shoe sole such as plaintiff wore (R. 87) and thereby reduced the likelihood of slipping. Vandever (R. 322) testified:

"Q. Translating that in terms of slipperiness when used by a shoe sole, what do you find?

"A. I find it more—based on those tests—it more difficult to slip when there is water on the step, sea water on this step, or oil on this step, or film on this step than a dry step."

The witness Barkley testified his tests performed as shown in Defendant's Exhibit 30 (R. 353, offered R. 331) were performed with the step saturated with the test fluid (R. 330) and that it took more pull to make a man slip from a wet step than from a dry step (R. 329).

Respondent submits that the presence of sea water could not have been a cause of the accident.

Even had plaintiff proved that water had got on the step through a defect of the vessel, he still has not proved unseaworthiness, since under the doctrine of *Cookingham*,

v. *United States*, 184 F. 2d 213 (3d Cir.), cert. den. 340 U. S. 935; *Shannon v. Union Barge Line Corp.*, 194 F. 2d 584 (3rd Cir.), cert. den. 344 U. S. 846; *Holliday v. Pacific Atlantic S. S. Co.*, 99 F. Supp. 173 (D. C. Delaware), and similar cases, a condition resulting from a transient substance on the tread of a ladder does not render the vessel unseaworthy.

- Finally, the petitioner has failed to show reversible error because he did not seek nor obtain a fact-finding that there was sea water upon the step. Plaintiff's trial theory was that there was oil upon the step. This issue he did submit, and the jury expressly found that the top step in question was not coated with oil (Special Issue No. 9, R. 386). He made no request for the submission of a similar issue as to the fact of water or substance other than oil upon the step in question. Consequently, the court did not submit nor did petitioner request the submission nor object to the failure to submit such an issue. After the verdict for the defendant, petitioner still had an opportunity under *Rule 279, Texas Rules of Civil Procedure*, to request the finding of such a fact by the trial court. This he did not do; neither did he assign the failure to find such fact as error in his motion for new trial.

The situation thus was that which is provided for in that portion of *Rule 279, Texas Rules of Civil Procedure*, which reads as follows:

"Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested

shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection, and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment; but if no such written findings are made, such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment. * * *."

Petitioner's situation is analogous to that of a plaintiff in a negligence case whose sole point of appeal is a complaint of the form of the special issue inquiring whether the alleged act constituted negligence and where the jury has found that the act itself did not occur. Certainly this is a clear situation for the application of *Rule 434, Texas Rules of Civil Procedure* (Appendix D), which enjoins the appellate court to reverse only where "the error complained of amounted to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case."

CONCLUSION

For the foregoing reasons, respondent respectfully prays that the judgment of the court below be affirmed, and, in

the alternative, that the case be remanded to the Court of Civil Appeals of the Fifth Supreme Judicial District for further consideration of the case.

Respectfully submitted,

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APPENDIX A**Article 5526, Sec. 6, Vernon's Civil Statutes of Texas,
Annotated (1925)****Art. 5526. Actions to be commenced in two years**

There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

6. Action for injury to the person of another.

APPENDIX B

Federal Employers' Liability Act

45 U. S. C. A. Sec. 52. Carriers in Territories or other possessions of United States.

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, tract, roadbed, works, boats, wharves, or other equipment. Apr. 22, 1908, c. 149, sec. 2, 35 Stat. 65.

Sec. 56. Actions; limitations; concurrent jurisdiction of courts.

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, sec. 6, 35 Stat. 66; Apr. 5, 1910, c. 143, sec. 1, 36 Stat. 291; Mar. 3, 1911, c. 231, sec. 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, sec. 2, 53 Stat. 1404; June 25, 1948, c. 646, sec. 18, 62 Stat. 989.

APPENDIX C**Jones Act**

46 U. S. C. A. Sec. 688. Recovery for injury to or death of seaman.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, sec. 20, 38 Stat. 1185; June 5, 1920, c. 250, sec. 33, 41 Stat. 1007.

Rule 279. Submission of Issues

When the court submits a case upon special issues, he shall submit the controlling issues made by the written pleadings and the evidence; and, except in trespass to try title, statutory partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to an affirmative submission of any issue in his behalf where such issue is raised only by a general denial and not by an affirmative written pleading on his part. Nothing herein shall change the burden of proof from what it would have been under a general denial. Where the court has fairly submitted the controlling issues raised by such pleadings and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue. Failure to submit an issue shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the issue is one relied upon by the opposing party. Failure to submit a definition or explanatory instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or explanatory instruction has been requested in writing and tendered by the party complaining of the judgment.

Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection, and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing

and at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment, but if no such written findings are made, such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment. A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party. Amended by Order of March 31, 1941.

Rule 434, If Judgment Reversed

When the judgment or decree of the court below shall be reversed, the court shall proceed to render such judgment or decree as the court below should have rendered, except when it is necessary that some matter of fact be ascertained or the damage to be assessed or the matter to be decreed is uncertain, in either of which cases the cause shall be remanded for a new trial.

Provided, first, that no judgment shall be reversed on appeal and a new trial ordered in any cause on the ground that the trial court has committed an error of law in the course of the trial, unless the appellate court shall be of the opinion that the error complained of amounted to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case, or was such as probably prevented the appellant from making a proper presentation of the case to the appellate court; and if it appear to the court that the error affects a part only of the matter in controversy, and the issues are severable, the judgment shall only be reversed and a new trial ordered as to that part affected by such error.

Provided, second, that if the erroneous action or failure or refusal of the trial judge to act shall prevent the proper presentation of a cause to the Court of Civil Appeals, and be such as may be corrected by the judge of the trial court,